Supreme Court, U.S.
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In the

Supreme Court of the United States

ANGELA SAVARD, et al.,

Petitioners,

v.

STATE OF RHODE ISLAND, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the First Circuit's "clear guidance" standard, which required that Petitioners produce a "very exact" precedential match to the facts of this case to defeat Respondents' claim of qualified immunity, is irreconcilable with the "fair warning" standard articulated by this Court in *Hope v. Pelzer*.

2. Whether Respondents had "fair warning" that they could not strip-search minor offense arrestees absent a reasonable suspicion that they were carrying or concealing weapons or contraband.

LIST OF PARTIES

All Petitioners in this Court – Angela Savard, Lisa Ronci, Priscilla Harris, Craig L. Roberts, Sr., Rebecca Dorsey, Kenneth Lowe, Jr., Robert Dull, Stephanie Clark, Misty Tolleson, George Barber, William Carcieri, Sammy Farland, Steven Fusco, Jeffrey Larisa, Charles Sanchez, Richard Squires, Anita Tarczuk, Nabbil Rashid, and Kevin Mancieri – were Plaintiffs in the District Court and Appellants in the First Circuit appeal below. All Respondents in this Court – State of Rhode Island, George Vose, A.T. Wall, William Cudworth, Albert Gardiner, Roberta Richman, and Paul M. Kennedy – were Defendants in the District Court and Appellees in the First Circuit.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF AUTHORITIES	v
INTRODUCTION	1
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT	2
REASONS FOR GRANTING THE PETITION	6
I. The First Circuit's Resolution of the Qualified Immunity Issue in this Case Conflicts With this Court's Decision in *Hope v. Pelzer* and with the Decisions of Other Circuit Courts of Appeal on the Same Important Issue	6
II. In *Hope v. Pelzer*, this Court Held that Defendants Who Had "Fair Warning" that Their Conduct Violated Plaintiffs' Constitutional Rights Were Not Entitled to Qualified Immunity	7
III. Respondents Were Granted Qualified Immunity in this Case Only Through Application of a "Clear Guidance" Standard that Legitimized an Artificial Distinction, that Required A "Very Exact" Precedential Match, and that is Irreconcilable with this Court's Decision In *Hope*	9

TABLE OF CONTENTS – Continued

Page

IV. The Consequences of the First Circuit's Decision 13

CONCLUSION 13

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Arruda v. Fair, 710 F.2d 886 (1st Cir. 1983) 9

Blackburn v. Snow, 771 F.2d 556 (1st Cir. 1985) 11, 12

Block v. Rutherford, 468 U.S. 576 (1984) 12

Burchett v. Kiefer, 310 F.3d 937 (6th Cir. 2002) 6

Cavalieri v. Shepard, 321 F.3d 616 (7th Cir. 2003) 6

Chapman v. Nichols, 989 F.2d 393 (10th Cir. 1993) 10

Cochrane v. Quattrocchi, 949 F.2d 11 (1st Cir. 1991) .. 11, 12

Covino v. Patrissi, 967 F.2d 73 (2d Cir. 1992) 9

Gates v. Collier, 501 F.2d 1291 (5th Cir. 1974) 8

Giles v. Ackerman, 746 F.2d 614 (9th Cir. 1984), cert. denied, 471 U.S. 1053 (1985) 11, 12

Hope v. Pelzer, 536 U.S. 730 (2002) ..... *passim*

Lassiter v. Alabama A&M Univ. Bd. of Trustees, 28 F.3d 1146 (11th Cir. 1994) 4

Mary Beth G. v. City of Chicago, 723 F.2d 1263 (7th Cir. 1983) 3

Masters v. Crouch, 872 F.2d 1248 (6th Cir.), cert. denied, 493 U.S. 977 (1989) 10

Roberts v. Rhode Island, 175 F. Supp. 2d 176 (D.R.I. 2000) 4

Roberts v. Rhode Island, 239 F.3d 107 (1st Cir. 2001) 3, 12

Savard v. Rhode Island, 338 F.3d 23 (1st Cir. 2003) ... 1, 5, 6

Shain v. Ellison, 273 F.3d 56 (2d Cir. 2001) 12

TABLE OF AUTHORITIES – Continued

Page

Swain v. Spinney, 117 F.3d 1 (1st Cir. 1997).....3, 4, 5, 9

Thomas v. Roberts, 261 F.3d 1160 (11th Cir. 2001)..... 4

Thomas v. Roberts, 536 U.S. 953 (2002)..... 7

United States v. Lanier, 520 U.S. 259 (1997)..... 8

Vaughn v. Cox, 536 U.S. 953 (2002)..... 7

Ward v. County of San Diego, 783 F.2d 1385 (9th Cir. 1986).....10

Williams v. Kaufman County, 343 F.3d 689 (5th Cir. 2003)..... 6

Willingham v. Loughnan, 537 U.S. 801 (2002)..... 7

Wood v. Clemons, 89 F.3d 922 (1st Cir. 1996).....10, 11

CONSTITUTION

U.S. Const. amend. IV 2

FEDERAL STATUTES

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1331..... 4

28 U.S.C. § 1343..... 4

42 U.S.C. § 1983..... 2

INTRODUCTION

In *Hope v. Pelzer*, 536 U.S. 730 (2002), this Court articulated a "fair warning" standard for qualified immunity that rejected the Eleventh Circuit's artificial distinction between a fence and a hitching post. The First Circuit has now created a "clear guidance" standard that not only accommodates, but encourages, artificial distinctions – in this case involving blanket strip-searches of minor offense arrestees, between a jail and a so-called "maximum security facility." The First Circuit's "clear guidance" standard sows doubt and confusion concerning the appropriate qualified immunity analysis, and emboldens government officials to look for loopholes in the law instead of conforming their conduct to the clearly established law.

OPINIONS BELOW

The First Circuit *en banc* opinion that Petitioners ask this Court to review is *Savard v. Rhode Island,* 338 F.3d 23 (1st Cir. 2003). (App. 1-38). The opinion of the original panel to hear Petitioners' First Circuit appeal (App. 39-55) was vacated when Respondents' Petition for Rehearing *En Banc* was granted. The original opinion of the District Court below is unreported. (App. 56-74).

JURISDICTION

This Petition asks the Court to review the First Circuit's August 4, 2003 Opinion and Judgment in this case. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the Constitution of the United States provides in pertinent part:

> The right of the people to be secure in their persons, . . . , against unreasonable searches . . . , shall not be violated. . . .

42 U.S.C. § 1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state . . . , subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunity secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

STATEMENT

Petitioners are just nineteen of thousands of people who, after being arrested for non-violent, non-drug related minor offenses, were taken to the Adult Correctional Institution in Cranston, Rhode Island ("the ACI") and strip-searched when there existed no reasonable suspicion that they were carrying or concealing weapons or contraband. Petitioner William Carcieri, for instance, was arrested and strip-searched for failing to pay a traffic ticket his son had received six years earlier while driving Mr. Carcieri's car. Petitioner Stephanie Clark was arrested and strip-searched for failing to appear for a probation

review when, in fact, she had already completed her probation.

Under the written policy mandating the blanket strip-searches at issue in this case, minor offense arrestees like Petitioners were required on admission to the ACI to submit to a thorough search of their "body to include examination of hair, arms, hands, ears, mouth, nose; visual examination of groin and rectum; toes and soles of feet." Male inmates were required to "lift their penis and testicles on the officer's command to provide a clear view of the groin area," and all inmates – male and female – were "required to bend over and spread the rectum to provide a clear view of the area." *Roberts v. Rhode Island*, 239 F.3d 107, 109 n.3 (1st Cir. 2001). "[F]ew exercises of authority by the state . . . intrude on the citizen's privacy and dignity as severely as the visual anal and genital searches" involved in this case. *Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1272 (7th Cir. 1983).

Petitioners' searches all occurred *after* the First Circuit had issued its opinion in *Swain v. Spinney*, 117 F.3d 1 (1st Cir. 1997), in which it recognized that clearly established law required that "[a] strip and visual body cavity search of an arrestee must be justified, *at the least*, by a reasonable suspicion." *Id.* at 5 (emphasis added). In Rhode Island, however, all persons arrested on outstanding warrants, regardless of how minor their offenses, are taken to the ACI, which Respondents have labelled a "maximum security facility." At the ACI, Respondents have chosen not to segregate inmates based on the severity of their offense, their criminal history, or any other factor. Instead, Respondents have elected to place all minor offense arrestees into the general inmate population, where they commingle with more serious offenders. It was

purportedly for this reason that Respondents, after *Swain*, continued to strip-search every minor offense arrestee on admission to the ACI, even if there existed no reasonable suspicion that they were carrying or concealing weapons or contraband.

By Order dated March 16, 2000, and amended March 24, 2000, Respondents' blanket strip-search policy was declared unconstitutional by the District Court. *Roberts v. Rhode Island*, 175 F.Supp.2d 176, 183 (D.R.I. 2000). The District Court held that a pre-arraignment search of an arrestee at the ACI could be performed only in situations where there existed a reasonable suspicion that the arrestee was carrying weapons or contraband. *Id.* The District Court's decision was affirmed on appeal by the First Circuit. *Roberts*, 239 F.3d at 113.

Petitioners filed the instant action in the District Court below pursuant to 28 U.S.C. §§ 1331 and 1343 to recover the damages they, and others like them, had sustained as a result of the unconstitutional strip-searches to which they were subjected at the ACI. But on April 12, 2002, two months prior to this Court's decision in *Hope v. Pelzer*, 536 U.S. 730 (2002), the District Court, the Honorable Mary M. Lisi presiding, granted Respondents' motion for summary judgment against Petitioners on qualified immunity grounds. (App. 70-71). The District Court relied upon two cases from the Eleventh Circuit – *Thomas v. Roberts*, 261 F.3d 1160, 1170-71 (11th Cir. 2001) and *Lassiter v. Alabama A&M Univ. Bd. of Trustees*, 28 F.3d 1146, 1150 (11th Cir. 1994) – which held that law can be clearly established only when the facts of previous cases are "materially similar" to the case at hand. (App. 70). The District Court held that, despite *Swain*, the law barring Petitioners' strip-searches was not clearly established at

the time of their searches under circumstances in which they would commingle with the general population of the ACI. (App. 70).

By the time Petitioners' appeal was first heard by the First Circuit, this Court had issued its June 27, 2002 decision in *Hope*, in which it held that the facts of prior cases need not be materially or fundamentally similar to the case at hand for governmental officials to have "fair warning" that their conduct violates constitutional rights. *Hope,* 536 U.S. at 741. The panel of the First Circuit that originally heard Petitioners' appeal, citing *Swain*, *Hope*, and the "overwhelming precedent" barring strip-searches of minor offense arrestees in the absence of reasonable, individualized suspicion, properly reversed the decision of the District Court and remanded for further proceedings. (App. 44-50).

After petition by Respondents, however, the First Circuit granted rehearing *en banc* and vacated the opinion of the original panel. Following additional briefing and argument, the eight judges of the First Circuit divided evenly on the issue of qualified immunity, thus affirming the District Court's pre-*Hope* dismissal of Petitioners' claims and depriving Petitioners of any remedy for the unconstitutional strip-searches to which they were subjected. *Savard*, 338 F.3d 23. (App. 2). The affirming judges held that, despite the First Circuit's ruling in *Swain*, and this Court's ruling in *Hope*, the absence of "direct precedent" addressing a situation in which minor offense arrestees would commingle with the general population of a "maximum security facility" deprived Petitioners of the "clear guidance" of prior authority necessary to overcome Respondents' qualified immunity defense. *Id.* at 32-33. (App. 15-18). No authority was cited by the affirming

judges for the creation of a new qualified immunity standard of "clear guidance."

In a lengthy and vigorous dissent, the four judges who agreed with Petitioners' position argued that the reasoning of their colleagues required "a very exact match" in precedential authority, "[ran] the risk of creating an impenetrable defense for government officials," and "flout[ed]" this Court's holding in *Hope*. *Savard*, 338 F.3d at 41. (App. 36).

REASONS FOR GRANTING THE PETITION

I. The First Circuit's Resolution of the Qualified Immunity Issue in this Case Conflicts With this Court's Decision in *Hope v. Pelzer* and with the Decisions of Other Circuit Courts of Appeal on the Same Important Issue.

In *Hope v. Pelzer*, 536 U.S. 730 (2002), a case originating from the Eleventh Circuit, this Court held that a defendant is not entitled to qualified immunity where there was "fair warning" that the conduct in issue violated the plaintiff's constitutional rights, and that precedent involving materially or fundamentally similar facts is not required. *Id.* at 741. Since *Hope*, a number of circuit courts of appeal, citing *Hope*'s "fair warning" standard, have rejected qualified immunity defenses in novel factual circumstances. *See, e.g., Williams v. Kaufman County*, 343 F.3d 689, 699 (5th Cir. 2003); *Cavalieri v. Shepard,* 321 F.3d 616, 622-23 (7th Cir. 2003); *Burchett v. Kiefer*, 310 F.3d 937, 945-46 (6th Cir. 2002).

In addition, this Court has remanded to the Eleventh Circuit for reconsideration a number of pre-*Hope* decisions that required materially similar precedent to overcome a

qualified immunity defense, including one that was cited by the District Court below in support of its decision. *Willingham v. Loughnan*, 537 U.S. 801 (2002); *Thomas v. Roberts*, 536 U.S. 953 (2002); *Vaughn v. Cox*, 536 U.S. 953 (2002).

Four judges of the First Circuit have now ignored *Hope*'s "fair warning" standard and created a new standard requiring that a qualified immunity defense prevail in the absence of "clear guidance" of prior authority. Applied to the circumstances of this case, this "clear guidance" standard legitimized an artificial distinction between jails and so-called "maximum security facilities" and required a "very exact" precedential match to the facts at hand to overcome Respondents' qualified immunity defense. As a consequence, the District Court's pre-*Hope* dismissal of this action due to the absence of "materially similar" precedent has been affirmed. The First Circuit's decision is irreconcilable with *Hope*, conflicts with recent decisions of other circuit courts, and will sow doubt and confusion concerning the appropriate qualified immunity analysis.

II. In *Hope v. Pelzer*, this Court Held that Defendants Who Had "Fair Warning" that Their Conduct Violated Plaintiffs' Constitutional Rights Were Not Entitled to Qualified Immunity.

In *Hope*'s discussion of the "fair warning" standard, the Court held that "a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though the very action in question has [not] previously been held unlawful." *Hope,* 536 U.S. at 742 (citing *United States v.*

Lanier, 520 U.S. 259, 270-71 (1997)). The Court specifically held that a right can be clearly established even if there is no case involving "fundamentally similar" or "materially similar" facts. *Hope*, 536 U.S. at 742. Otherwise, "trial judges [would] demand a degree of certainty at once unnecessarily high and likely to beget much legal wrangling." *Lanier*, 520 U.S. at 270.

In *Hope*, this Court held that the defendants had no qualified immunity for handcuffing an inmate to a hitching post on two occasions, one which lasted for seven hours. The Court ruled that the decision in *Gates v. Collier*, 501 F.2d 1291 (5th Cir. 1974), "gave respondents fair warning that their alleged treatment of Hope was unconstitutional." *Hope,* 536 U.S. at 742. In *Gates,* the Fifth Circuit condemned, in passing, the practice of handcuffing inmates for prolonged periods of time to cells and fences. *Gates,* 501 F.2d at 1306.[1] While the Eleventh Circuit in *Hope* found a constitutional distinction between handcuffing an inmate to a fence and handcuffing an inmate to a hitching post sufficient to support qualified immunity, this Court disagreed, saying that drawing such a distinction "exposes the danger of a rigid, overreliance on factual similarity." *Hope*, 536 U.S. at 742.

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[1] *Gates* was a 31-page opinion that addressed a variety of prison conditions. The condemnation of handcuffing inmates to cells and fences for prolonged periods of time appeared only briefly as part of a lengthy sentence that listed a variety of punitive practices the Fifth Circuit believed violated the Eighth Amendment.

III. Respondents Were Granted Qualified Immunity in this Case Only Through Application of a "Clear Guidance" Standard that Legitimized an Artificial Distinction, that Required A "Very Exact" Precedential Match, and that is Irreconcilable with this Court's Decision In *Hope*.

In *Swain v. Spinney*, 117 F.3d 1, 7 (1st Cir. 1997), a decision that pre-dated Petitioners' strip-searches, the First Circuit held that minor offense arrestees cannot be strip-searched unless there is a reasonable suspicion that they are carrying or concealing weapons or contraband. The four judges below who concluded that Respondents were entitled to qualified immunity did not cite a single case that reached a different result.[2] To the contrary, the affirming judges acknowledged the pre-existing authority that clearly established that minor offense arrestees cannot be strip-searched without reasonable suspicion, even in instances in which the arrestees would commingle with more serious offenders in a jail's general population. *Id.* at 30-31 (App. 13). Few issues are so well-settled – indeed, "[n]o published state or federal case since [1966] . . . upholds the constitutionality of a blanket policy of

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[2] The case cited by the affirming judges as "closer to this case than any other" – *Covino v. Patrissi*, 967 F.2d 73 (2d Cir. 1992) – involved the strip-search of a person arrested for kidnapping a child, an offense for which he was subsequently sentenced to imprisonment for 20 to 35 years. *Id.* at 74-75, n.1. The affirming judges also cited the First Circuit's opinion in *Arruda v. Fair*, 710 F.2d 886 (1st Cir. 1983). That opinion, which was written by Justice Breyer, involved strip-searches of convicted felons so dangerous that they were incarcerated in a "special maximum security unit" *within* a maximum security facility. *Id.* at 886-87.

strip-searches of minor offense arrestees." *Ward v. County of San Diego*, 783 F.2d 1385, 1388 (9th Cir. 1986).

But instead of applying *Hope*'s "fair warning" standard to determine whether Respondents should have qualified immunity for the blanket strip-searches to which Petitioners were subjected, the affirming judges required "clear guidance" in the form of "direct precedent" that specifically barred such searches in a "maximum security facility" to overcome Respondents' qualified immunity defense. *Id.* at 33 (App. 15-18). The affirming judges protested that their decision did not require "a perfect precedential match" to the facts of this case, *Savard*, 338 F.3d at 33 (App. 18), but all that is lacking in this case *is* a perfect precedential match – a case that says that minor offense arrestees may not be strip-searched unless there exists a reasonable suspicion that they are carrying or concealing weapons or contraband, even though they are commingled with more serious offenders *in what governmental authorities call a "maximum security facility."*

There is no more constitutionally legitimate distinction between a jail and a so-called "maximum security facility" under the circumstances of this case than there was between a fence and the hitching post involved in *Hope*. It is clearly established that the basis for reasonable suspicion must be attributable to the individual arrestee – his or her offense, criminal history or behavior. "[A] strip search cannot be justified absent some quantum of *individualized suspicion*." *Wood v. Clemons*, 89 F.3d 922, 928 (1st Cir. 1996) (emphasis in original). Individualized suspicion cannot be created by a decision of governmental authorities to commingle minor offense arrestees with more serious offenders. *See, e.g., Chapman v. Nichols*, 989 F.2d 393, 396 (10th Cir. 1993); *Masters v. Crouch*, 872 F.2d

1248, 1255 (6th Cir.), *cert. denied*, 493 U.S. 977 (1989); *Giles v. Ackerman*, 746 F.2d 614, 619 (9th Cir. 1984), *cert. denied*, 471 U.S. 1053 (1985). In *Giles*, the Ninth Circuit, in striking down the defendants' blanket strip-search policy, held that "'[d]efendants' heavy reliance on the intermingling of its temporary detainees with the general [jail] population is misplaced . . . ' because such intermingling is both limited *and avoidable*." *Id.* at 619 (citing *Smith v. Montgomery County*, 547 F.Supp. 592, 598-99 (D.Md. 1982)) (emphasis added). In the case at bar, Respondents strip-searched Petitioners, and have now been granted qualified immunity, as the very consequence of Respondents' decision *not* to avoid commingling Petitioners with more serious offenders.

The First Circuit had not distinguished between jails and maximum security facilities in prior cases involving application of a reasonable suspicion requirement. In *Blackburn v. Snow*, 771 F.2d 556 (1st Cir. 1985), the First Circuit dealt with strip-searches of prison visitors that occurred in 1977, when "the exact parameters of official authority to strip-search prison visitors were not yet clear." *Id.* at 570. In that case, however, the First Circuit had no difficulty rejecting the defendant's argument that he was entitled to qualified immunity, finding that strip-searching prison visitors when there was no cause to believe they were carrying contraband so "violated the most *fundamental* principles of personal privacy and dignity for which the Fourth Amendment stands" that "*it required [no] 'specific judicial articulation.'*" *Id.* at 570 (citing *King v. Higgins*, 702 F.2d 18, 20 (1st Cir. 1983)) (emphasis added); *see also Wood,* 89 F.3d at 928. More recently, in *Cochrane v. Quattrocchi*, 949 F.2d 11 (1st Cir. 1991), a case specifically involving the ACI, the First

Circuit reversed directed verdicts that were granted ACI officials for strip-searching an inmate's daughter, saying that "the jury could have found that the strip search of [the plaintiff] was unreasonable because it was based on *no* 'individualized suspicion.'" *Id.* at 13 (emphasis in original).

The fact that *Blackburn* and *Cochrane* involved prison visitors and not minor offense arrestees makes them more applicable to the circumstances of this case, not less. Prison visitors are recognized as presenting greater security risks than minor offense arrestees. *Roberts*, 239 F.3d at 111; *Giles*, 746 F.2d at 617. This Court has recognized that prison visitors "invite a host of security problems" because they can pass weapons and contraband "to an inmate unnoticed by even the most vigilant observers." *Block v. Rutherford*, 468 U.S. 576, 586 (1984). As the Second Circuit has observed:

> It is far less obvious that misdemeanor arrestees frequently or even occasionally hide contraband in their bodily orifices. *Unlike persons already in jail who receive contact visits*, arrestees do not ordinarily have notice that they are about to be arrested and thus an opportunity to hide something.

Shain v. Ellison, 273 F.3d 56, 64 (2d Cir. 2001) (emphasis added). As the First Circuit acknowledged when affirming the injunction issued against the ACI's blanket strip-search policy, the ACI had never found weapons or contraband in a minor offense arrestee's rectum or genital area. *Roberts*, 239 F.3d at 112 n.6.

There is no legitimate distinction between a jail and a maximum security facility when it comes to strip-searches

of minor offense arrestees. *Hope*'s "fair warning" standard does not accommodate such artificial distinctions; the First Circuit's "clear guidance" standard invites them.

IV. The Consequences of the First Circuit's Decision.

In this case, the First Circuit has compounded the District Court's pre-*Hope* error by articulating a new "clear guidance" standard that legitimizes artificial distinctions in prior authority. The decision below returns the qualified immunity analysis not just to the search for fundamentally similar or materially similar precedent rejected by this Court's decision in *Hope v. Pelzer*, but to a search for a "very exact" precedential match that is clearly incompatible with *Hope*'s "fair warning" standard.

In the First Circuit today, government officials need not conform their conduct to clearly-established law so long as their precise factual circumstances have yet to be addressed. Government officials in the First Circuit are now encouraged to look for loopholes in the law instead of conforming their conduct to the clearly-established law. The First Circuit's decision in this case, left undisturbed, will resurrect the requirement of materially similar precedent rejected by this Court in *Hope v. Pelzer*.

CONCLUSION

To resolve the conflict that now exists among the judges of the First Circuit itself, among the Courts of Appeal, and between the First Circuit's decision in this

case and this Court's decision in *Hope v. Pelzer*, Petitioners respectfully request that this Court grant this petition.

Respectfully submitted,

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November 3, 2003

United States Court of Appeals
For the First Circuit

No. 02-1568

ANGELA SAVARD, ET AL.,

Plaintiffs, Appellants,

v.

STATE OF RHODE ISLAND, ET AL.,

Defendants, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF RHODE ISLAND
[Hon. Mary M. Lisi, *U.S. District Judge*]

Before

Boudin, *Chief Judge*,

Coffin and Bownes, *Senior Circuit Judges*,

Torruella, Selya, Lynch, Lipez and Howard,
Circuit Judges.

Gregory A. Belzley, with whom *Dinsmore & Shohl LLP* and *Thomas W. Kelly* were on brief, for appellants.

Rebecca Tedford Partington, Deputy Chief, Civil Division, with whom *Patrick C. Lynch*, Attorney General, was on brief, for appellees.

App. 2

JUDGMENT AND
OPINIONS EN BANC

August 4, 2003

This appeal having been considered by the court en banc, the judgment of the district court is affirmed by an equally divided court. The opinions that follow reflect the views of the participating judges.

– Opinions Follow –

By the Court

RICHARD CUSHING DONOVAN
Richard C. Donovan, Clerk

SELYA, Circuit Judge (with whom BOUDIN, Chief Judge, and LYNCH and HOWARD, Circuit Judges, join). The plaintiffs, all of whom were arrested in Rhode Island for non-violent, non-drug-related misdemeanors, were subjected to unconstitutional searches of their persons incident to their detention at the Adult Correctional Institutions (the ACI). These searches, conducted pursuant to a longstanding institutional policy, encompassed both strip searches (i.e., visual inspections of the naked body) and visual body cavity searches (i.e., inspections of the anal and genital areas).[1] After the courts struck down the strip search policy, the plaintiffs sued the

[1] For ease in reference, we sometimes use the shorthand term "strip search" to describe both practices.

State of Rhode Island and a number of prison officials for damages sustained as a result of the illegal intrusions.

The plaintiffs' suit invoked 42 U.S.C. § 1983 (2000). Because the State is immune from suits for damages under section 1983, *see Will v. Mich. Dep't of State Police,* 491 U.S. 58, 71 (1989); *Johnson v. Rodriguez,* 943 F.2d 104, 108-09 (1st Cir. 1991), the controversy before us focuses on the liability vel non of the individual defendants. After some preliminary skirmishing, the district court entered summary judgment in favor of those defendants on the basis of qualified immunity. A panel of this court reversed that ruling, but the full court subsequently granted rehearing en banc and (as is customary in such instances) ordered the panel opinion withdrawn. The court now divides equally and thus affirms the district court's ruling. The judges who subscribe to this opinion believe that affirmance is fully warranted: upon a broad review of the preexisting law and its application to the unusual situation at the ACI, we conclude that, when the underlying events occurred, prudent prison officials reasonably could have believed that Rhode Island's strip search policy was constitutional.

I. BACKGROUND

In reviewing a grant of summary judgment, we rehearse the facts in the light most sympathetic to the non-moving parties (here, the plaintiffs), indulging all reasonable inferences in their favor. *See, e.g., Suarez v. Pueblo Int'l, Inc.,* 229 F.3d 49, 53 (1st Cir. 2000). Here, however, that praxis has little bearing, for the facts upon which our decision turns are largely undisputed.

Unlike other states, Rhode Island has no regional or county detention facilities. It operates only a single, all-purpose penitentiary: the ACI. Centrally located in Cranston, Rhode Island, the ACI comprises seven separate maximum security facilities. Two of those units – one for women and the other for men – receive all persons committed to the custody of the Department of Corrections regardless of the nature of their offenses. At the times material hereto, these intake facilities housed an array of prisoners ranging from newly sentenced felons to convicts under protective custody to pretrial detainees to arrestees. All of these individuals, except for detainees held in protective custody, were commingled while in various parts of the intake facilities. Detainees held in protective custody used the same areas as other inmates but at different times.

During the currency of this arrangement, Rhode Island maintained written policies that required all new entrants into the ACI, including misdemeanant arrestees, to undergo strip and body cavity searches. In 1999, Craig Roberts ran afoul of this policy. Local police, having made a routine stop of a motor vehicle in which Roberts was a passenger, learned that the Rhode Island Family Court had issued a body attachment – the functional equivalent of a writ of arrest – addressed to him. Although Roberts protested that the body attachment had been withdrawn and produced what purported to be documentation to that effect, the police detained him.

In accordance with the customary procedure, the police transported Roberts to the ACI. Upon his admission, he was twice subjected to strip and body cavity searches. These searches uncovered no drugs, weapons, or other contraband. Shortly thereafter, a sheriff verified that the

body attachment had been withdrawn. Roberts was released.

Roberts was gone but not forgotten. He brought suit in the federal district court alleging that the strip searches had violated his constitutional rights. Upon cross-motions for summary judgment, the district court ruled that the strip searches had offended Roberts's rights under the Fourth Amendment and enjoined the State from continuing to enforce the written policies then in effect. *Roberts v. Rhode Island,* 175 F. Supp. 2d 176, 183 (D.R.I. 2000) (*Roberts I*). We affirmed. *Roberts v. Rhode Island,* 239 F.3d 107, 113 (1st Cir. 2001) (*Roberts II*).

Rhode Island abandoned the proscribed policy from and after the date of the district court's decision (March 17, 2000). Thereafter, eighteen plaintiffs – all of whom had been arrested for non-violent, non-drug-related misdemeanors and subjected to strip and body cavity searches prior to that date – brought a new action in the federal district court on behalf of themselves and all others similarly situated. In their class-action complaint, the plaintiffs alleged that the searches violated their constitutional rights and sought money damages.

The suit named as defendants the State and a galaxy of prison officials. Upon the defendants' motion, the district court dismissed Roberts's claim for damages based on the doctrine of res judicata. *See, e.g., Allen v. McCurry,* 449 U.S. 90, 94 (1980) (stating that res judicata precludes a plaintiff from relitigating issues that were or could have been raised in an earlier action against the same defendant prescinding from the same set of operative facts); *Kale v. Combined Ins. Co.,* 924 F.2d 1161, 1165-66 (1st Cir. 1991) (same). The court thereafter entered summary

judgment against the remaining plaintiffs. The court reasoned that, prior to the decision in *Roberts I,* it was not clearly established that prison officials needed some particularized suspicion before strip-searching misdemeanant arrestees who were about to be introduced into the general population at a maximum security prison (and, therefore, that the defendants enjoyed the protection of qualified immunity). This appeal followed.

II. ANALYSIS

We review orders granting summary judgment de novo. *Plumley v. S. Container, Inc.,* 303 F.3d 364, 369 (1st Cir. 2002). Where, as here, a party's entitlement to summary judgment hinges on a claim of qualified immunity, we must balance the need to vindicate constitutional rights against the need to insulate public officials from civil litigation that might unduly inhibit the assiduous discharge of their duties. *See Anderson v. Creighton,* 483 U.S. 635, 638 (1987). In balancing those competing needs, we employ a three-part algorithm. *Suboh v. Dist. Att'y's Office,* 298 F.3d 81, 90 (1st Cir. 2002); *Hatch v. Dep't for Children, Youth and Their Families,* 274 F.3d 12, 20 (1st Cir. 2001). The threshold question is whether the plaintiffs have established a constitutional violation. *Hope v. Pelzer,* 536 U.S. 730, 736 (2002); *Saucier v. Katz,* 533 U.S. 194, 201 (2001). The second question deals with fair warning; it asks whether the law was clearly established at the time of the constitutional violation. *Hope,* 536 U.S. at 739-41; *Anderson,* 483 U.S. at 638-40. The final question is whether a reasonable official, situated similarly to the defendant(s), would have understood that the conduct at issue contravened the clearly established law. *Saucier,* 533 U.S. at 202.

In this case, the first part of the algorithm need not detain us. We acknowledge that strip searches are intrusive and degrading (and, therefore, should not be unreservedly available to law enforcement officers). The *Roberts* decisions exemplify this thinking; they hold unequivocally that the ACI's policy of strip-searching persons arrested for non-violent, non-drug-related misdemeanors, in the absence of particularized suspicion, violated the Constitution. *See Roberts II,* 239 F.3d at 113; *Roberts I,* 175 F. Supp. 2d at 183. The questions on which this appeal turns, therefore, involve the second and third branches of the qualified immunity algorithm. We must determine whether the law was clearly established, prior to March 17, 2000, to the effect that prison officials need at least reasonable suspicion before subjecting misdemeanant arrestees to strip searches when introducing them into the general population of a maximum security prison, and whether a reasonable prison official, situated similarly to the defendants, would have understood at that time that the policy in place at the ACI transgressed the Constitution.

Although the bases for these determinations often overlap, the instant plaintiffs cannot prevail unless we determine both questions favorably to them. Thus, we begin our analysis with an examination of whether the law can be said to have been "clearly established" at or before the critical time (March 17, 2000).[2] The degree to which the law was clearly established as of a particular date is a

[2] Because we answer this question in the negative, *see* text *infra,* we need not address the final prong of the qualified immunity algorithm.

matter for the court to determine. *Elder v. Holloway,* 510 U.S. 510, 516 (1994); *Siegert v. Gilley,* 500 U.S. 226, 232 (1991); *Diaz v. Martinez,* 112 F.3d 1, 3 (1st Cir. 1997).

The fundamental justification for the qualified immunity defense is that public officials performing discretionary functions should be free to act without fear of punitive litigation except when they fairly can anticipate that their conduct will give rise to liability for damages. *Davis v. Scherer,* 468 U.S. 183, 195 (1984). That anticipation depends, in large part, on the extent to which legal rules are clearly established. *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982). The standard is an objective one. *Anderson,* 483 U.S. at 639; *Iacobucci v. Boulter,* 193 F.3d 14, 21 (1st Cir. 1999). It follows, then, that an inquiry into the reasonableness of an officer's conduct must focus on the discernible contours of the law at the time of the alleged act or omission. *Hatch,* 274 F.3d at 22-23.

To attain the necessary perspective, an inquiring court must look back in time and conduct the juridical equivalent of an archeological dig. The court must canvass controlling authority in its own jurisdiction and, if none exists, attempt to fathom whether there is a consensus of persuasive authority elsewhere. *See Wilson v. Layne,* 526 U.S. 603, 617 (1999); *Brady v. Dill,* 187 F.3d 104, 116 (1st Cir. 1999).

This exploration is not limited to cases directly on point. Because "officials can still be on notice that their conduct violates established law even in novel factual circumstances," *Hope,* 536 U.S. at 741, overcoming a qualified immunity defense does not require a plaintiff to show that either the particular conduct complained of or some materially indistinguishable conduct has previously

been found unlawful. *See United States v. Lanier,* 520 U.S. 259, 268-71 (1997); *Mitchell v. Forsyth,* 472 U.S. 511, 535 n.12 (1985). Still, the relevant legal rights and obligations must be particularized enough that a reasonable official can be expected to extrapolate from them and conclude that a certain course of conduct will violate the law. *Saucier,* 533 U.S. at 201-02. Consequently, if the operative legal principles are clearly established only at a level of generality so high that officials cannot fairly anticipate the legal consequences of specific actions, then the requisite notice is lacking. The bottom line is that the qualified immunity defense prevails unless the unlawfulness of the challenged conduct is "apparent." *Anderson,* 483 U.S. at 640.

Against this backdrop, we turn to the degree of clarity in the law relevant to this case. In conducting our appraisal, we have endeavored to take into account all the decisional law, in and out of our own circuit, that was on the books at the time of the events in question. *See Lanier,* 520 U.S. at 268-69; *Hatch,* 274 F.3d at 23.

At the margins, the lines are easily plotted. On the one hand, courts long have viewed blanket strip searches as extreme intrusions upon Fourth Amendment rights. *See, e.g., Bell v. Wolfish,* 441 U.S. 520, 558 (1979); *Mary Beth G. v. City of Chicago,* 723 F.2d 1263, 1272 (7th Cir. 1983). On the other hand, security is a paramount concern in prison environments, and courts long have recognized that unpleasantly intrusive security measures, up to and including blanket strip searches, may be proper in such settings. *See Bell,* 441 U.S. at 560-62; *Bonitz v. Fair,* 804 F.2d 164, 170 (1st Cir. 1986). The constitutional line that separates permissible from impermissible uses of these methods is imprecise and context-specific. In the last

analysis, plotting that line requires a determination of what is reasonable under a given set of circumstances. *Bell,* 441 U.S. at 559; *United States v. Chamorro,* 687 F.2d 1, 5 (1st Cir. 1982).

The difficulty, of course, is that this formulation, while legally respectable, does not go very far toward curing the imprecision with which decisionmakers must grapple. This is inevitable – or nearly so – given the subject matter. In the best of circumstances, "[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application." *Bell,* 441 U.S. at 559. Indeed, the Supreme Court itself has acknowledged, in a qualified immunity case, "the difficulty of determining whether particular searches or seizures comport with the Fourth Amendment." *Anderson,* 483 U.S. at 644. And that difficulty is compounded where, as here, the determination involves gauging whether a serious intrusion is reasonable in an incarcerative environment. *See Swain v. Spinney,* 117 F.3d 1, 9 (1st Cir. 1997).

With these basic tenets in mind, we examine the two First Circuit decisions that bear most closely on this case. Neither comparison is very exact.

We start with *Swain.* There, police arrested a woman on suspicion of narcotics possession and temporarily held her in a jail cell by herself. *Id.* at 8. The officers, following institutional practice, strip-searched her. *Id.* at 4-5. We declared the strip search unconstitutional, holding that strip-searching an arrestee ordinarily requires at least reasonable suspicion that the person arrested is concealing contraband or weapons. *Id.* at 7. We pointed out that, in Swain's case, there was no basis for any such suspicion. *Id.* at 8-9. Moreover, she was being held in virtual isolation, so

there was no risk that she would come in contact with other prisoners (and, thus, succeed in smuggling contraband or weapons into the jail). *Id.* at 8.

The plaintiffs contend that *Swain* clearly established the law relevant to this case. It is, however, an oversimplification to say that, because we applied the reasonable suspicion standard to strip searches in a particular custodial context, the handwriting was on the wall that the same standard would apply to the ACI as well. There are important differences between detaining an arrestee in virtual isolation and introducing an arrestee into the general population of a maximum security prison.

Making this point brings us to our second case – a decision that the defendants insist has decretory significance here. That case is *Arruda v. Fair,* 710 F.2d 886 (1st Cir. 1983) (Breyer, J.). There, we upheld a blanket strip search policy with regard to prison inmates. *Id.* at 888. We reasoned that because the searches involved the most dangerous of prisoners as they departed from, and entered into, a particularly sensitive area of a maximum security prison, security concerns provided a compelling justification for the institution's policy. *Id.* at 887-88.

As in *Arruda,* the defendants in this case attempt to justify their blanket strip search policy as a necessary (or, at least, reasonable) means of ensuring institutional security. They maintain that the unique nature of the ACI's intake facilities, in which arrestees are intermingled with maximum security prisoners, raises concerns similar to those raised in *Arruda* and warrants the implementation of such a policy. This argument has considerable force, for *Arruda* reasonably can be read as saying that the risk that any prisoner in a maximum security facility might

receive weapons or contraband from visitors, renegade guards, or others is enough to justify a blanket strip search policy. But despite its broad language, *Arruda* involved strip searches of convicted felons, not misdemeanant arrestees – and that disparity cannot idly be brushed aside.

In the end, we recognize that both *Swain* and *Arruda* offer valuable insights, but that neither is a very exact match. While *Swain* makes clear that strip searches ought not lightly to be indulged, the factual context of the case presented rather minimal security concerns. And while *Arruda* makes clear that institutional security needs may require intrusive measures in a maximum security setting, that case dealt not with persons arrested for relatively innocuous misdemeanors, but, rather, with hardened criminals. So long as the facts in these cases are distinguishable in a fair way from the facts at hand – and we believe that they are – then neither of them can be said to have clearly established the law for purposes of a qualified immunity determination in the instant case. *See Saucier,* 533 U.S. at 202-03.

We recognized much the same point in *Roberts II,* 239 F.3d at 111 (noting that "[t]he institutional security concerns in play here fall somewhere between those exhibited in *Swain,* which were insufficient to support a search, and those in *Arruda* and *Bell,* which made broad-based searches without individual suspicion reasonable"). To be sure, we ultimately placed the case "on the *Swain* side of the constitutional line." *Id.* But our acknowledgment that the ACI's strip search policy fell into the gray area between *Swain* and *Arruda* carries more weight for present purposes than our actual holding. A holding on the merits is not dispositive on the issue of qualified immunity. *See*

Cookish v. Powell, 945 F.2d 441, 443 (1st Cir. 1991); *Morales v. Ramirez,* 906 F.2d 784, 787 (1st Cir. 1990). The law does not expect a public official, faced with the need to make an objectively reasonable real-world judgment, to anticipate precisely the legal conclusions that will be reached by a panel of federal appellate judges after briefing, arguments, and full-fledged review. *See Wilson,* 526 U.S. at 617.

The plaintiffs, ably represented, go beyond *Swain* and *Arruda* in an effort to convince us that reasonable correctional officials should have realized the unconstitutionality of the ACI's strip search policy prior to March 17, 2000. They point to a line of cases stating that blanket strip searches of misdemeanant arrestees, conducted without particularized suspicion, are unconstitutional. *See, e.g., Masters v. Crouch,* 872 F.2d 1248, 1255 (6th Cir. 1989); *Weber v. Dell,* 804 F.2d 796, 804 (2d Cir. 1986); *Stewart v. Lubbock County,* 767 F.2d 153, 156-57 (5th Cir. 1985); *Giles v. Ackerman,* 746 F.2d 614, 618-19 (9th Cir. 1984); *Hill v. Bogans,* 735 F.2d 391, 394-95 (10th Cir. 1984). These cases come as no surprise; we cited many of them in *Roberts II,* 239 F.3d at 111-13. For qualified immunity purposes, however, there are important distinctions between these cases and the case at hand.

In the first place, all the cases upon which the plaintiffs rely deal with detentions in local jails and police stations. In contrast, the case before us involves detentions in a maximum security prison. This distinction is quite meaningful: the case law emphasizes that prison regulations may constitutionally impinge upon fundamental rights so long as such regulations are reasonably related to legitimate penological interests. *See, e.g., Overton v. Bazzetta,* 123 S. Ct. 2162, 2167 (2003); *Turner v.*

Safley, 482 U.S. 78, 87 (1987). Within the walls of a maximum security prison, the need to preserve internal security is compelling. *Hudson v. Palmer,* 468 U.S. 517, 526-27 (1984); *Wood v. Clemons,* 89 F.3d 922, 928 (1st Cir. 1996). We think it follows that Rhode Island correctional officials reasonably could have regarded the stark differences between local lockups and maximum security prisons as pivotal in deciding whether a particular security-oriented policy was necessary. We explain briefly.

The population of a maximum security prison tends to be much more volatile and much less transient than that of a county jail. *See Shain v. Ellison,* 273 F.3d 56, 65 (2d Cir. 2001). Thus, it is fairly debatable whether inmates in such a facility may be likely to arrange for an outsider to bring them weapons or other contraband by being arrested for a minor offense. *Compare, e.g., Watt v. City of Richardson Police Dep't,* 849 F.2d 195, 198 (5th Cir. 1988) (declaring that "a suspect jailed even temporarily on a minor offense could have the opportunity, if not searched, to smuggle in weapons or contraband," so that strip-searching such suspects "is not an irrational attempt to foster . . . security"), *with, e.g., Walsh v. Franco,* 849 F.2d 66, 69 (2d Cir. 1988) (declaring that "the risk of a misdemeanor arrestee's introducing contraband into the general jail population simply d[oes] not warrant a strip search of all arrestees"). The debatable nature of the question argues in favor of qualified immunity. *See Goyco de Maldonado v. Rivera,* 849 F.2d 683, 688 (1st Cir. 1988) (stating that an official "need show no more than that [the question is close] to prevail on his qualified immunity defense"); *Vazquez Rios v. Hernandez Colon,* 819 F.2d 319, 328 (1st Cir. 1987) (noting that "the closeness of the call

suggests that [the law] could not have been 'clearly established' ").

The cases upon which the plaintiffs rely are distinguishable in yet another salient respect. Those cases do not gainsay that the security concerns arising out of the intermingling of inmates are a significant counterweight in the balance that must be struck between personal rights and practical necessities. Read for all they are worth, the plaintiffs' cases at most deny that this counterweight is a sufficient justification in particular circumstances (invariably, circumstances attending an arrestee's detention at facilities such as jails and police stations). *See, e.g., Masters,* 872 F.2d at 1255; *Hill,* 735 F.2d at 394; *Logan v. Shealy,* 660 F.2d 1007, 1013 (4th Cir. 1981). Given the unique features of the ACI's intake facilities, the composition of the inmate population, and the fact that the misdemeanant arrestees generally were not searched prior to their arrival at the ACI, it was hardly unreasonable for Rhode Island correctional officials to calibrate the balance differently.

In point of fact, a separate line of cases has emphasized the need to defer to the judgment of correctional officials in addressing institutional security needs. *See, e.g., Overton,* 123 S. Ct. at 2167; *Procunier v. Martinez,* 416 U.S. 396, 404-05 (1974); *Hay v. Waldron,* 834 F.2d 481, 486 (5th Cir. 1987); *see also Bell,* 441 U.S. at 547-48. After all, institutional security is "perhaps the most legitimate of all penological goals." *Overton,* 123 S. Ct. at 2168; *accord Pell v. Procunier,* 417 U.S. 817, 823 (1974).

In an opinion that is closer to this case than any other, the Second Circuit upheld a policy in which a prison facility conducted random strip searches of all inmates,

including pretrial detainees. *See Covino v. Patrissi,* 967 F.2d 73, 80 (2d Cir. 1992). Adverting, among other things, to the fact that the plaintiff (a pretrial detainee) commingled with sentenced inmates who had histories of violence and substance abuse, the court concluded that the prison's policy was a reasonable response to the officials' concerns.[3] *Id.* at 78-79.

The short of the matter is that, throughout the last quarter of the twentieth century, courts had pursued two divergent lines of precedent. This case, as we said in *Roberts II,* 239 F.3d at 111, fell along neither axis, but, rather, into the tenebrious middle. We are mindful that there is a distinction for qualified immunity purposes between an unconstitutional but objectively reasonable act and a blatantly unconstitutional act. *Saucier,* 533 U.S. at 206; *Anderson,* 483 U.S. at 641. Here, the lack of any direct precedent and the undulating contours of the law during the relevant period combine to persuade us that the constitutional violation was not obvious; the defendants reasonably could have thought, prior to *Roberts I,* that there was room in the law for the ACI's strip search policy.

The plaintiffs pose one last challenge to the assertion of a qualified immunity defense. They note that, rather than strip-searching all arrestees, officials at the ACI could have employed less extreme measures such as

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[3] Of course, the plaintiff there had been arrested for an offense more serious than those attributed to the plaintiffs in this case. *Covino,* 967 F.2d at 75 n.1. The Second Circuit did not base its decision on this distinction, however, nor did it limit its holding to blanket strip searches of "major" offenders.

conducting pat-down searches or segregating misdemeanant arrestees from the rest of the prison population. In support of this view, they point to our conclusion that the search policy was almost entirely unnecessary to control the entry of contraband into the ACI. *See Roberts II,* 239 F.3d at 112. But this too involves a judgment call. In the relevant time frame, some cases indicated that blanket strip searches are never constitutional when the security needs they address could be met by less intrusive means. *E.g., Giles,* 746 F.2d at 617; *Sostre v. Preiser,* 519 F.2d 763, 764 (2d Cir. 1975). Other cases suggested that the availability of less intrusive means is irrelevant to the analysis so long as officials reasonably could have concluded that such measures were more burdensome and less efficacious than blanket strip searches. *See, e.g., Bell,* 441 U.S. at 559 n.40; *Hay,* 834 F.2d at 485; *Blackburn v. Snow,* 771 F.2d 556, 566 (1st Cir. 1985); *see also Turner,* 482 U.S. at 90-91 (emphasizing that "prison officials do not have to set up and then shoot down every conceivable alternative method of accommodating the claimant's constitutional complaint").[4] Given this split in authority, we find that the law on this matter was also not clearly established. Therefore, the defendants reasonably could have believed (until the federal court declared Rhode Island's blanket strip search policy unconstitutional) that they were under no legal obligation to resort to alternative measures.

Our brethren suggest that we require an exact match with the facts of previously decided cases before we will

[4] Indeed, the *Bell* Court suggested that the lack of a history of discovered contraband on inmates' bodies might attest to the effectiveness of this search modality as a deterrent. *Bell,* 441 U.S. at 559.

deny a defendant the shield of qualified immunity. That is simply not so. What is so is that "[t]he meaning of reasonableness [of a search] for Fourth Amendment purposes is highly situational" and requires "a balancing of the need to search against the invasion which the search entails." *Wood,* 89 F.3d at 928 (citations and internal quotation marks omitted). The cases that our brethren cite in an effort to show that reasonable suspicion was clearly established as a condition precedent to a strip search of a person in custody are no more on point than the cases, cited above, that authorize various exceptions to that generality. Given this cacophony of voices, a reasonable prison official, faced with the novel factual situation that confronted those who were in charge of the ACI, had no way of knowing which voice should guide him in drawing the Fourth Amendment balance. It is the absence of clear guidance, not the absence of a perfect precedential match, that makes qualified immunity appropriate here.

In this regard, our colleagues reprove us for attributing significant weight both to the dangers inherent in commingling violent felons with misdemeanant arrestees and to distinctions between jails and maximum security prisons. We plead guilty to that charge. But we attach weight to those factors because of our respect for those who must maintain institutional security in the most difficult of settings. Correctional officials charged with the operation of maximum security prisons have an unenviable task – and courts should be reluctant casually to impose on them personal liability for damages in the absence of "standards sufficiently clear and simple to be applied with a fair prospect of surviving judicial second-guessing months and years [later]." *Atwater v. City of Lago Vista,* 532 U.S. 318, 349 (2001).

To sum up, the district court mortally wounded the ACI's blanket strip search policy in *Roberts I,* and we administered the last rites in *Roberts II.* That policy is now dead and buried. While we have found the defendants' resolution of the Fourth Amendment balance incorrect, *see Roberts II,* 239 F.3d at 112-13, we conclude that, given the mixed signals sent by the case law, the difficulties inherent in Fourth Amendment balancing in the prison context, the special features of the ACI, and the wide berth called for by the qualified immunity doctrine, the defendants, prior to March 17, 2000, reasonably could have believed the ACI's policy to be both justified and constitutional. Put another way, the defendants did not have fair warning, prior to March 17, 2000, that their conduct was unlawful. If judges can span the spectrum on this sort of constitutional question, it would certainly be unfair to hold the defendants liable for doing nothing more blameworthy than guessing incorrectly about how the courts ultimately would resolve the issue. *See Wilson,* 526 U.S. at 618.

III. CONCLUSION

We need go no further. This is a close case, but we do not require public officials to foretell the course of constitutional law with absolute accuracy in order to obtain the balm of qualified immunity. *Id.* at 617. To the contrary, the doctrine of qualified immunity is designed to protect "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs,* 475 U.S. 335, 341 (1986). Concluding, as we do, that the law as it existed when the events at issue occurred did not clearly establish that the ACI's policy authorizing blanket strip and body cavity searches violated the plaintiffs' Fourth Amendment rights,

we would uphold the entry of summary judgment in the defendants' favor on the basis of qualified immunity.

BOWNES, *Senior Circuit Judge*, with whom COFFIN, *Senior Circuit Judge*, TORRUELLA, *Circuit Judge*, and LIPEZ, *Circuit Judge*, join. The defendants in this case were granted qualified immunity because, according to the district court, the law did not "clearly establish" that reasonable suspicion was needed to strip search people arrested for non-violent, non-drug related minor offenses. Our four respected colleagues agree with this analysis. We do not. The opinion of our colleagues is wrong on the law, the logic that they adopt is at odds with recent Supreme Court precedent regarding qualified immunity, and we believe their reasoning will put constitutional rights at risk.

It is important to keep in mind what we are dealing with in this case. The strip searches conducted here are "perhaps 'the greatest personal indignity' searching officials can visit upon an individual." *Blackburn v. Snow*, 771 F.2d 556, 564 (1st Cir. 1985) (quoting *Bell v. Wolfish*, 441 U.S. 520, 594 (1979)). According to Rhode Island's written policies, these searches included a "visual examination of [the] groin and rectum." Male arrestees were required to "lift their penises and testicles on the officer's command to provide a clear view of the groin area." Both male and female arrestees were required "to bend over and spread the rectum to provide a clear view of the area." Moreover, these searches were conducted against harmless individuals. All of the plaintiffs in this case were arrested for non-violent, non-drug related minor offenses. By way of example, one of the plaintiffs, George Barber, loaned his car to his son in 1993 and the son received a traffic ticket that was never paid. Six years later, Barber was arrested

because of the unpaid ticket, held at the Adult Correctional Institutions ("the ACI") overnight and strip searched twice. Another plaintiff, Stephanie Clark, called police for assistance after an auto accident and was arrested because a computer check showed an outstanding arrest warrant for her failure to appear at a probation review. Clark had already finished her probation and the warrant was issued in error. She was taken to the ACI and strip searched twice.

With these facts in mind, we turn to the legal issues in this case. We begin with whether it was the "clearly established" law in this circuit, as of March 17, 2000, that prison officials needed reasonable suspicion to strip search non-violent, non-drug related minor offense arrestees.[5] "One tried and true way of determining whether [a] right was clearly established . . . is to ask whether existing case law gave the defendants fair warning that their conduct violated the plaintiff's constitutional rights." *Suboh v. Dist. Attorney's Office of the Suffolk Dist.*, 298 F.3d 81, 93 (1st Cir. 2002). Our colleagues describe this inquiry as an archeological dig, yet focus on only the top and bottom

[5] We note at the outset that the reasonable suspicion standard is not particularly demanding. Reasonable suspicion is "something stronger than a mere hunch, but something weaker than probable cause." *Wood v. Clemons*, 89 F.3d 922, 929 (1st Cir. 1996) (citation and quotation marks omitted). It is a standard that can be satisfied by a wide range of circumstances, including "the crime charged, the particular characteristics of the arrestee, and/or the circumstances of the arrest." *Weber v. Dell*, 804 F.2d 796, 802 (2d Cir. 1986); *see also Roberts v. Rhode Island*, 239 F.3d 107, 113 (1st Cir. 2001) (*Roberts II*) (stating that reasonable suspicion can be based on "observations of a particular inmate during a less invasive pat-down frisk and clothing search, or based on contraband found during that search").

layers of the excavation. *See Swain v. Spinney,* 117 F.3d 1 (1st Cir. 1997); *Arruda v. Fair,* 710 F.2d 886 (1st Cir. 1983). Our colleagues choose to ignore the cases that lie in the layers in between, thereby omitting consideration of relevant precedent. A proper qualified immunity analysis requires a court to look "at all available case law." *Hatch v. Dep't for Children, Youth and Their Families,* 274 F.3d 12, 23 (1st Cir. 2001). We will therefore briefly trace the development of this circuit's reasonable suspicion standard as it applies to strip searches.

The place to start is the Supreme Court's decision in *Bell v. Wolfish,* 441 U.S. 520 (1979). In that case, the Court upheld a strip and visual body cavity search of pretrial detainees who had contact with prison visitors. *Id.* at 560. In doing so, the Court conducted an analysis that balanced the need for the searches against the invasion of personal rights. *Id.* Although the Court said that the practice of strip searching individuals "instinctively gives us the most pause," it found the searches constitutional because of the security needs of the prison, i.e., the realistic possibility that contraband could pass from visitor to detainee. *Id.* at 558. But the Court was clear to delineate the scope of its holding:

> [W]e deal here with the question whether visual body-cavity inspections . . . can *ever* be conducted on less than probable cause. Balancing the significant and legitimate security interests of the institution against the privacy interests of the inmates, we conclude that they can.

Id. at 560 (emphasis in original). In other words, *Bell* established the ceiling; it made clear that prison officials did not necessarily need probable cause to strip search pretrial detainees. But *Bell* left the floor undefined. Still

unanswered was the question of whether prison officials needed any level of particularized suspicion that detainees were carrying contraband or weapons or in a position to receive them from others before conducting strip searches.

Our early cases applying *Bell* to the prison environment dealt largely with situations involving prison visitors. In one of our first prison visitor cases, *Blackburn v. Snow,* 771 F.2d 556 (1st Cir. 1985), we held that:

> [T]he Constitution requires a more particularized level of suspicion to justify the humiliating and intrusive searches conducted here. While we need not define here precisely what level of individualized suspicion is required . . . a rule unabashedly requiring none cannot be reconciled with the Fourth Amendment.

Id. at 567; *see also Cochrane v. Quattrocchi,* 949 F.2d 11, 13 (1st Cir. 1991). It is also noteworthy that we surveyed the legal landscape as it existed at the time and grouped arrestees into the category of strip search scenarios in which particularized suspicion was necessary. *See Blackburn,* 771 F.2d at 565. This grouping was merely a foreshadowing of things to come.

In *Wood v. Clemons,* 89 F.3d 922 (1st Cir. 1996), we clarified that the level of particularized suspicion required before subjecting prison visitors to strip searches was "reasonable suspicion." *Id.* at 929. We said that "a strip search cannot be justified absent some quantum of *individualized suspicion.* In determining the *level* of individualized suspicion . . . courts have converged upon one common benchmark: the standard of 'reasonable suspicion.'" *Id.* at 928 (emphasis in original) (citations omitted).

Our cases addressing the reasonable suspicion standard in the context of strip and visual body cavity searches were not limited to prison visitors. We required reasonable suspicion for strip searches at border crossings. *See United States v. Uricoechea-Casallas,* 946 F.2d 162, 166 (1st Cir. 1991). And most significantly for this case, we held in *Swain v. Spinney,* 117 F.3d 1 (1st Cir. 1997), that there must be reasonable suspicion to conduct strip searches of arrestees. *Id.* at 7.

In *Swain,* we examined our prior cases dealing with prison visitors and border searches, as well as relevant cases from other circuits. We concluded that "it is clear that at least the reasonable suspicion standard governs strip and visual body cavity searches in the arrestee context as well." *Id.* This ruling was consistent with cases from numerous other circuits.[6]

Our brethren mischaracterize the holding in *Swain.* They paraphrase *Swain* as holding that reasonable suspicion is "ordinarily" required for arrestees and that strip searches "ought not lightly to be indulged." We respectfully disagree with our colleagues' description of *Swain's* holding. *Swain's* holding is clear and unqualified. *Swain* does

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[6] *See Justice v. City of Peachtree City,* 961 F.2d 188, 193 (11th Cir. 1992); *Masters v. Crouch,* 872 F.2d 1248, 1255 (6th Cir. 1989), *cert. denied,* 493 U.S. 977 (1989); *Weber v. Dell,* 804 F.2d 796, 802 (2d Cir. 1986), *cert. denied,* 483 U.S. 1020 (1987); *Jones v. Edwards,* 770 F.2d 739, 742 (8th Cir. 1985); *Stewart v. Lubbock County, Tex.,* 767 F.2d 153, 156-57 (5th Cir.), *cert. denied,* 475 U.S. 1053 (1985); *Giles v. Ackerman,* 746 F.2d 614, 618 (9th Cir. 1984), *cert. denied,* 471 U.S. 1053 (1985); *Hill v. Bogans,* 735 F.2d 391, 394 (10th Cir. 1984); *Mary Beth G. v. City of Chicago,* 723 F.2d 1263, 1273 (7th Cir. 1983); *Logan v. Shealy,* 660 F.2d 1007, 1013 (4th Cir. 1981), *cert. denied,* 455 U.S. 942 (1982).

not say that reasonable suspicion is only sometimes required. Rather than paraphrase the words of *Swain,* we shall quote its holding directly: "A strip and visual body cavity search of an arrestee must be justified, at the least, by a reasonable suspicion." 117 F.3d at 5. It is hard to imagine a more clear statement of the law.

Our colleagues fail to mention that *Swain* contained another holding that is especially relevant to this case. When analyzing the issue of qualified immunity we stated:

> Furthermore, while some courts have suggested that a *higher* standard may be necessary to justify a strip search and visual body cavity inspection, it was clearly established at the time of the search [May 18, 1993] that the Fourth Amendment requires *at least* a reasonable suspicion to conduct these types of searches.

Id. (emphasis in original). This ruling too was in accord with decisions by other circuits.[7]

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[7] *See Chapman v. Nichols,* 989 F.2d 393, 398 (10th Cir. 1993) (holding that it was clearly established that a strip search policy applied to minor offense detainees without particularized reasonable suspicion was unlawful); *Masters,* 872 F.2d at 1255 ("The decisions of all the federal courts of appeals that have considered the issue reached the same conclusion: a strip search of a person arrested for a traffic violation or other minor offense not normally associated with violence and concerning whom there is no individualized reasonable suspicion that the arrestee is carrying or concealing a weapon or other contraband, is unreasonable. We believe the right of such a person to be free of such a search was 'clearly established' on October 21, 1986."); *Weber,* 804 F.2d at 803 (denying qualified immunity for defendants who performed suspicionless strip searches on arrestees because "at least eleven circuit court decisions ... hold similar policies unconstitutional"); *Jones,* 770 F.2d at 742 n.4 (denying defendants qualified

(Continued on following page)

In short, *Swain* states unequivocally that reasonable suspicion is required to strip search arrestees and that this requirement was clearly established as early as 1993, well before the dates in question here. These rulings were in conformity with circuits across the country.

Despite this overwhelming precedent, our colleagues claim that *Swain's* holdings could not have given the defendants fair warning that the reasonable suspicion standard would apply to them. They say that *Swain* involved an arrestee who was held alone in a single cell, whereas the plaintiffs in this case were commingled with other prisoners. Admittedly, our precedent does not speak to commingling specifically. But that fact does not mean that the defendants are entitled to qualified immunity. *See Hatch,* 274 F.3d at 23 (although "[o]ur own precedents are . . . inconclusive," the law was clearly established by "an emerging body of decisional law outside our own circuit"). Commingling may not always pose a security risk. It is not commingling, per se, that presents a security problem; it is commingling that involves a risk of illegal traffic among the commingled inmates.

As early as *Blackburn,* we rejected the argument that "the security needs of a prison can, *standing alone,* properly justify the 'complete withdrawal' of Fourth Amendment rights from *all* who enter [a prison]." 771 F.2d at 563 (emphasis in original); *see also Logan,* 660 F.2d at 1013 ("An indiscriminate strip search policy routinely applied to detainees . . . cannot be constitutionally justified simply on

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immunity because the Fourth Amendment's protection against suspicionless strip searches of arrestees was well established).

the basis of administrative ease in attending to security considerations.").

Cases from other circuits are more explicit in rejecting the commingling argument advanced by the defendants.[8] Most notable is the Sixth Circuit's holding in *Masters v. Crouch,* 872 F.2d 1248 (6th Cir. 1989):

> [T]he fact of intermingling [with other prison inmates] alone has never been found to justify such a search without consideration of the nature of the offense and the question of whether there is any reasonable basis for concern that the particular detainee will attempt to introduce weapons or other contraband into the institution.

Id. at 1254. In short, the cases from other circuits, when read in conjunction with our own precedent, would not permit a reasonable prison official to conclude that minor offense arrestees could be strip searched without reasonable suspicion simply because the prison officials decide to mix the arrestees with other prisoners.

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[8] *See Walsh v. Franco,* 849 F.2d 66, 69 (2d Cir. 1988) (ruling that a blanket strip search of all misdemeanor arrestees was not permissible simply because those arrestees were commingled among arraigned inmates); *Giles v. Ackerman,* 746 F.2d 614, 617-18 (9th Cir. 1984) ("Defendants' heavy reliance on the intermingling of its temporary detainees with the general [jail] population is misplaced because such intermingling is both limited and avoidable.") (citation and internal quotation marks omitted) (alteration in original); *Chapman,* 989 F.2d at 396 (rejecting the defendant's argument "that the invasion posed by his policy is justified by the need for jail security because women detainees must be incarcerated in one cell with the general jail population"); *Hill,* 735 F.2d at 394 (rejecting intermingling argument because "intermingling is only one factor to consider in judging the constitutionality of a strip search").

Our colleagues say that *Swain* could not have provided fair warning for another reason. According to our brethren, *Swain,* as well as the cases from other circuits upon which it relied, involved local jails rather than prisons, like the ACI. The distinction between jails and maximum security prisons is a crucial leg upon which our colleagues' opinion rests. It is here that their incomplete archeological excavation which we mentioned earlier becomes important. The cases that our colleagues ignored involved the early development of our reasonable suspicion standard as it applied to strip searches of prison visitors. At issue in those cases were both jails *and* prisons. *See Wood,* 89 F.3d at 925 (prison); *Blackburn,* 771 F.2d at 559 (county jail).

Even more relevant is the fact that one of those cases dealt with the ACI. *See Cochrane,* 949 F.2d at 12. In *Cochrane,* we vacated a judgment granting directed verdicts for ACI officials defending the strip search of an inmate's daughter. We said that:

> [A]bsent any evidence that appellant ever violated a prison visitation rule, or even supplied Cochrane with drugs, a reasonable juror could have concluded that Cochrane's contraband drugs were supplied by prison officials or other inmates. Thus, the jury could have found that the strip search of appellant was unreasonable because it was based on *no* "individualized suspicion."

Id. at 13 (emphasis in original). Our colleagues maintain that the defendants were justified in believing that no reasonable suspicion was required in this case in part because the defendants "must maintain institutional security in the most difficult of settings." Yet the same

setting and security considerations were not enough to defeat the requirement for individualized suspicion in *Cochrane*. We do not understand on what legal basis our colleagues can now say that those same security needs made the defendants' unconstitutional strip searches reasonable. Certainly the defendants had fair warning that the reasonable suspicion standard would be applied to them because, in fact, they had already been held to that standard in the past.

Of course, one difference between *Cochrane* and the present case is that *Cochrane* involved prison visitors, not minor offense arrestees. But this fact does not help the defendants; if anything, it further highlights why the defendants had fair warning that their strip search policies were unreasonable.

The Supreme Court has explained that prison visitors "invite a host of security problems" because they can pass weapons and contraband "to an inmate unnoticed by even the most vigilant observers." *Block v. Rutherford,* 468 U.S. 576, 586 (1984). It is well recognized, however, that individuals arrested for non-violent, non-drug related minor offenses do not present the same security risk as prison visitors. *See Roberts II,* 239 F.3d at 111; *Giles,* 746 F.2d at 617. This is because arrests, unlike visits, are not planned events. They are random and do not afford an arrestee the opportunity to hatch a scheme to smuggle contraband into a prison. As the Second Circuit has explained:

> It is far less obvious that misdemeanor arrestees frequently or even occasionally hide contraband in their bodily orifices. Unlike persons already in jail who receive contact visits, arrestees do not ordinarily have notice that they are about to be arrested and thus an opportunity to hide

> something. For the exceptions – for example, a person who is allowed to visit the bathroom unescorted before an arrest – reasonable suspicion may well exist.

Shain v. Ellison, 273 F.3d 56, 64 (2d Cir. 2001). Our brethren overlook the important fact that the Court in *Bell* authorized strip searches of detainees only after the detainees had come into contact with prison visitors. *See* 441 U.S. at 558. The present case involves people brought to the ACI because they were arrested, sometimes mistakenly as the record reveals, for non-violent, non-drug related minor offenses. They did not come into contact with prison visitors.

Our colleagues concoct a hypothetical situation in which an inmate arranges for an outsider to bring weapons or contraband inside the prison by staging an incident that would lead to the outsider being arrested for a minor offense. With due respect, this is chimerical. The only case our colleagues have exhumed to support their scenario is *Watt v. City of Richardson Police Dep't,* 849 F.2d 195 (5th Cir. 1988). They claim *Watt* stands for the idea that "a suspect jailed even temporarily on a minor offense could have the opportunity, if not searched, to smuggle weapons or contraband." *Id.* at 198. The very next sentence from *Watt,* however, shows that the quote upon which they rely is applicable only to those arrestees charged with weapons, shoplifting or drug offenses or those with a history of such offenses. *See id.* ("Limiting the searches generally to those offenders charged with or having a criminal history of narcotics, shoplifting or weapons charges is not an irrational attempt to foster jail security. . . . "). *Watt* does not support our colleagues' theory that non-violent, non-drug related minor offense arrestees will conduct

coordinated smuggling schemes to infiltrate prisons with contraband and weapons.

Perhaps more importantly, there is no evidence in the record to support our colleagues' hypothetical. In fact, the record undermines it. At no time has the ACI ever found weapons or contraband in an arrestee's rectum or genital area. *Roberts II,* 239 F.3d at 112 n.6. Only on one occasion has the ACI found contraband in the body cavity of a minor offense arrestee. *Id.* In that instance, the arrestee was hiding a bag of drugs in his mouth. *Id.* All the other contraband that the ACI has found on minor offense arrestees has been discovered in their clothing. It is obvious that the intrusive and degrading searches that the ACI chose to institute were not required to find this contraband. *Id.*

No historical analysis of our strip search cases would be complete without a close examination of our holding in *Arruda v. Fair,* 710 F.2d 886 (1st Cir. 1983). Our colleagues say that *Arruda* is a case with "considerable force" because it "reasonably can be read as saying that the risk that *any prisoner* in a maximum security facility might receive weapons or contraband from visitors, renegade guards, *or others* is enough to justify a blanket strip search policy." (emphasis added). Characterized in this manner, *Arruda* forms another critical leg upon which our colleagues' opinion stands. Their expansive reading of *Arruda* is unwarranted. *Arruda* is a totally different case than what we face here. It is so different that no reasonable official could have read *Arruda* to authorize suspicionless strip searches of minor offense arrestees. This is true for three reasons.

First, *Arruda* was decided twenty years ago and, as we have already discussed, our cases since *Arruda* have made clear that reasonable suspicion is required to strip search arrestees. *See Swain,* 117 F.3d at 7.

Second, *Arruda* was a case involving "particularly dangerous prisoners." 710 F.2d at 887. These prisoners were convicted felons assigned to a special cell block, which we described as a " 'prison within a prison,' designed to hold the most dangerous inmates." *Id.* The plaintiff himself was assigned to this special cell block for assaulting another prisoner. *Id.* In addition, the plaintiff testified that, while a prisoner, he possessed drugs and a weapon. *Id.* at 888. It is beyond comprehension how the defendants can equate extraordinarily violent convicted felons with people who have been arrested for minor offenses.

Third, and most pertinently, what we identified in *Arruda* as the "closest question," *id.,* most analogous to the instant case, was whether prisoners who were convicted felons needed to be searched en route from cell to library or infirmary, even though accompanied by a guard. Like the misdemeanor arrestees here, there would seem to be no basis for any suspicion that such inmates would possess contraband. The record in *Arruda,* however, revealed a number of instances when guards were found to be involved in smuggling drugs to prisoners. This caused us to hold, "[G]iven the problem of prison employee involvement with contraband, the district court's conclusion is not unreasonable." *Id.; but see id.* at 891, 890 (Maletz, J., dissenting in part) ("When one of the primary justifications for strip searches in these circumstances rests on the institution's inability to control its own staff the scales tip decidedly in favor of the inmate. . . . I am constrained to conclude that routine visual strip searches before and

after visits to the prison library and prison hospital are unreasonable, absent some level of cause.").

Twenty years have passed since we decided *Arruda* and the case law barring suspicionless strip searches of minor offense arrestees has proliferated. And *Swain,* with its clear recognition that a strip search requires reasonable suspicion, has been on the books of this circuit since 1997. The record in this case does not reveal a prison employee drug smuggling problem. There remains only the speculative risk that a non-violent, non-drug related misdemeanant, randomly arrested, might fortuitously be a bearer of contraband. That is not enough, in our view, to permit the defendants to escape liability for their unconstitutional acts.

The only similarity between *Arruda* and the present case is that the correctional facilities in both cases are maximum security prisons. This is the vital similarity upon which the defendants' argument relies. Despite the key differences I have described above, our colleagues are persuaded by this single similarity. Our colleagues say that prison officials cannot be expected to anticipate precisely the legal conclusions that we judges will make after full briefing and argument. We agree with that statement as a general matter. But that is not to say that prison officials have no responsibility to analyze the law. All of the individual defendants here are high level prison officials.[9] They are not entry-level prison guards who have

[9] The individual defendants include the former and current director of the Rhode Island Department of Corrections, the former and current warden of the Intake Services Center at the ACI, the warden of

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no access to legal advice and have superiors who have failed to supply any training on constitutional law whatsoever. The defendants in this case *are* the superiors and should be held to the standard of a "reasonably competent public official [who] should know the law governing his conduct." *Harlow v. Fitzgerald,* 457 U.S. 800, 819 (1982). The qualified immunity analysis is based on an objective standard. *See Suboh,* 298 F.3d at 95. This necessarily implies some informed and professional analysis. Merely to take refuge in the concept that the ACI is a maximum security prison, without identifying any realistic distinction between the situation in *Arruda* and the situation that the defendants were confronted with at the ACI, falls far short of any credible analysis of the state of the law both within and outside this circuit.

We close our review of the relevant legal history regarding strip searches with an important observation. Our colleagues do not cite to a single case which permits suspicionless strip searches of non-violent, non-drug related minor offense arrestees. It is quite amazing that they can claim the law is ambiguous but fail to provide a single case that directly supports their position. The only case our colleagues offer is *Covino v. Patrissi,* 967 F.2d 73 (2d Cir. 1992). But that case, as our colleagues readily admit, is not on point. The plaintiff in *Covino* was not arrested for non-violent, non-drug related minor offenses like the plaintiffs in this case. He was arrested for kidnaping a child under the age of sixteen and was ultimately sentenced to 20 to 35 years in prison. *Id.* at 75 n.1. In

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the women's facility at the ACI, and the chief of recruitment and training at the Rhode Island Department of Corrections.

addition, the prison superintendent in *Covino* testified that "occasionally contraband and drugs were found secreted in an inmate's rectum." *Id.* at 79. As we have already explained, the evidence in this case is to the contrary.

Without direct legal support, our brethren are forced to argue that generalized statements from certain cases made the law so ambiguous that the defendants could not have had fair warning. Our colleagues argue, for example, that there exists "a separate line of cases [that] has emphasized the need to defer to the judgment of correctional officials in addressing institutional security needs." If these types of sweeping statements are enough to shield prison officials from liability for their illegal actions, then there is the significant risk that qualified immunity will always attach.

It is this concern that brings us to our final point. Up to now, we have argued that our colleagues analysis of our legal history is incomplete and untenable. This is not the only flaw in their opinion. We are deeply troubled by the weight our colleagues give to our statement in *Roberts II* that institutional security concerns in this case "fall somewhere between" those exhibited in *Swain* and *Arruda*. 239 F.3d at 111. Our colleagues describe this statement as an acknowledgment that the ACI's strip search policy fell into a "gray area" of the law. We respectfully disagree. The *Roberts II* statement merely recognizes the obvious: that the facts of the present case fall somewhere between those of *Swain* and *Arruda*. Such an observation is not surprising. Indeed, most cases will fall somewhere between *Swain* and *Arruda* because those two cases represent the opposite ends of the spectrum. *Swain* was a case involving an arrestee who was placed in a cell in a

local police station. In contrast, *Arruda* involved extraordinarily violent convicted felons who were confined to a special security section of a maximum security prison. What our colleagues have done is to construe a dictum probably intended to soften criticism of the prison officials into a sweeping carte blanche, protecting officials for a wide swath of conduct elsewhere long since forbidden.

Placing so much weight on the *Roberts II* statement runs the risk of creating an impenetrable defense for government officials. Our colleagues' reliance on the *Roberts II* statement implies that qualified immunity will only be denied in this circuit when the facts of the case at bar are the same as those in previously decided cases. This risk is compounded by our colleagues' statement that *Swain* could not give the defendants fair warning because it is not "a very exact match" to the facts of this case.

Such reasoning flouts the Supreme Court's holding in *Hope v. Pelzer,* 536 U.S. 730 (2002). In *Hope,* the Court admonished the Eleventh Circuit for finding the law clearly established only when the facts of previous cases were "fundamentally similar" to the present case. *Id.* at 739. The Court said that such an approach was a "rigid gloss on the qualified immunity standard . . . [that] is not consistent with our cases." *Id.* The Court explained that "officials can still be on notice that their conduct violates established law even in novel factual circumstances," and that "[a]lthough earlier cases involving 'fundamentally similar' facts can provide especially strong support for a conclusion that the law is clearly established, they are not necessary to such a finding. The same is true of cases with 'materially similar' facts." *Id.* at 741.

Our colleagues respond by saying that "[i]t is the absence of clear guidance, not the absence of a perfect precedential match, that makes qualified immunity appropriate here." In short, they reject *Swain* as giving "clear guidance" because of factual differences, while claiming allegiance to *Hope's* ruling that "fundamentally similar" facts are not necessary. This seems to us an attempt to have it both ways.

Our colleagues may well be correct that the strip search policy at issue in this case, and others like it, are "dead and buried." But their qualified immunity analysis will live on; it will undoubtedly be used in future cases involving other important constitutional rights. The qualified immunity defense is "an attempt to balance competing values: not only the importance of a damages remedy to protect the rights of citizens . . . but also 'the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority.'" *Harlow,* 457 U.S. at 807 (quoting *Butz v. Economou,* 438 U.S. 478, 504-06 (1978)). By finding ambiguity in our cases where there is none, and by implying that previous cases must be "a very exact match" before they can give fair warning for purposes of the qualified immunity analysis, our brethren have tipped the balance away from the Constitution. They have gone far toward granting absolute immunity under the cloak of qualified immunity. We believe that this court is obliged not only to give due deference to the judgment of government officials but to insist that the constitutional rights of individuals be vigilantly protected.

If the bar to a remedy is set too high, then constitutional rights are in jeopardy. Government officials will have less incentive to change their illegal policies on their

own accord because the deterrent effect of damages is lacking. Aggrieved individuals will have less incentive to challenge those policies because monetary compensation for their harms is unavailable. In the end, unconstitutional government action is more likely to go unchanged. That is our ultimate concern.

United States Court of Appeals
For the First Circuit

No. 02-1568

ANGELA SAVARD, ET AL.,

Plaintiffs, Appellants,

v.

STATE OF RHODE ISLAND, ET AL.,

Defendants, Appellees.

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF RHODE ISLAND

[Hon. Mary M. Lisi, *U.S. District Judge*]

Before

Selya, *Circuit Judge*,

Coffin and Bownes, *Senior Circuit Judges*.

Gregory A. Belzley with whom *Frost Brown Todd LLC*, *Thomas W. Kelly* and the *Law Offices of Thomas W. Kelly* were on brief for appellants.

Rebecca Tedford Partington, Deputy Chief, Civil Division, with whom *Sheldon Whitehouse*, Attorney General, was on brief for appellees.

February 11, 2003

BOWNES, ***Senior Circuit Judge.*** Plaintiffs-appellants were all arrested in Rhode Island for non-violent, non-drug related minor offenses. After their arrest, the plaintiffs were taken to a Rhode Island prison and subjected to unconstitutional strip and visual body cavity searches. The plaintiffs brought suit against the defendants-appellees, who include the State of Rhode Island and numerous prison officials, pursuant to 42 U.S.C. § 1983 and various state laws for damages sustained as a result of the illegal searches. The district court granted the defendants' motion for summary judgment on the ground that the defendants were entitled to qualified immunity, and therefore shielded from lawsuits seeking damages for their actions. We reverse.

I. BACKGROUND

The state of Rhode Island operates the Adult Correctional Institution ("ACI"), which consists of seven separate prison facilities. One of those facilities receives all males committed to the custody of Rhode Island's Department of Corrections, regardless of the nature of an arrestee's offense. This facility houses not only pretrial arrestees, but also newly sentenced inmates awaiting transport to other facilities, pretrial protective custody detainees, and sentenced inmates under protective custody. All of these individuals are at times commingled with each other, except for those held in protective custody. Even then, inmates held in protective custody use the same facilities as other detainees, but at different times. Females are

processed through a different ACI facility. At the female facility, arrestees are commingled with either sentenced inmates or inmates awaiting trial.

At the times material hereto, Rhode Island maintained written policies that required new arrestees admitted into ACI to undergo strip searches and visual body cavity searches.[1] These searches included "examination of hair, arms, hands, ears, mouth, nose; visual examination of groin and rectum; toes and soles of feet." As part of the searches, males were required to "lift their penises and testicles on the officer's command to provide a clear view of the groin area." Both male and female detainees were required "to bend over and spread the rectum to provide a clear view of the area."

On April 20, 1999, Craig Roberts ("Roberts") was a passenger in a car stopped by the police for expired registration stickers. A check of police computers revealed that Roberts was the subject of an "outstanding body attachment," a type of writ issued by a magistrate in Rhode Island family court. The police frisked Roberts, but found no weapons or contraband. Although Roberts produced a carbon-copy of a family court order withdrawing the body attachment, the police arrested Roberts and took him to ACI.

Upon arriving at ACI, Roberts was subjected to a strip and visual body cavity search pursuant to the written

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[1] A "strip search" is a visual inspection of an inmate's naked body. A "visual body cavity search" is a strip search that includes the visual inspection of an inmate's anal and genital areas. *See Blackburn* v. *Snow,* 771 F.2d 556, 561 n.3 (1st Cir.1985).

policies described above. No weapons or contraband were found. After the search, Roberts was placed in a segregated cell. Later that day, Roberts was subjected to another strip and visual body cavity search in preparation for his transportation to the Garrahy Judicial Complex. Again, no weapons or contraband were found. After arriving at the complex, Roberts' carbon-copy of the order withdrawing the body attachment was shown to a sheriff and Roberts was released.

In 1999, Roberts brought a complaint in the district court alleging that the strip and visual body cavity searches required by Rhode Island's written policies violated his Fourth Amendment right to be free from unreasonable searches. Upon cross-motions for summary judgment, the district court ruled that the searches were unconstitutional and issued an order enjoining Rhode Island from conducting searches in accordance with those written policies. *Roberts* v. *Rhode Island,* 175 F. Supp.2d 176, 183 (D.R.I. 2000). On appeal, we affirmed the district court's ruling. *Roberts* v. *Rhode Island,* 239 F.3d 107, 113 (1st Cir. 2001).

In 2000, Roberts and other similarly situated individuals brought a separate action in the district court against Rhode Island and various prison officials alleging that the searches violated their constitutional rights and seeking damages under 42 U.S.C. § 1983, state tort law, and state statutory law. Like Roberts, the new plaintiffs all claimed they were arrested for non-violent, non-drug related minor offenses and subjected to strip and visual body cavity searches at ACI prior to March 17, 2000. By way of example, one of the new plaintiffs, George Barber, loaned his car to his son in 1993 and the son received a traffic ticket that was never paid. Six years later, Barber

was arrested because of the unpaid ticket, held at ACI overnight and strip searched twice. Another plaintiff, Stephanie Clark, called police for assistance after an auto accident and was arrested because a computer check showed an outstanding arrest warrant for her failure to appear at a probation review. Clark had already finished her probation and the warrant was issued in error. She was taken to ACI and strip searched twice.

Upon the defendants' motion, the district court dismissed Roberts' claim based on the doctrine of res judicata. The defendants then moved for summary judgment as to the remaining plaintiffs. The district court granted the motion on the ground that qualified immunity shielded the defendants from damages. According to the district court, the defendants were entitled to qualified immunity because it was not the "clearly established" law in this circuit that prison officials needed at least reasonable suspicion that arrestees for minor offenses were carrying weapons or contraband before conducting strip and visual body cavity searches.

II. DISCUSSION

We review a district court's grant of a motion for summary judgment de novo; we examine the evidence in the light most favorable to the non-moving party, and draw all reasonable inferences in its favor. *See Sands* v. *Ridefilm Corp.*, 212 F.3d 657, 660 (1st Cir. 2000). A motion for summary judgment should be granted only if there is an absence of "sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Id.* at 61 (quoting *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986)).

"Qualified immunity specially protects public officials from the specter of damages liability for judgment calls made in a legally uncertain environment." *Ryder* v. *United States,* 515 U.S. 177, 185 (1995). The purpose of the qualified immunity doctrine is to balance the need to vindicate constitutional rights against the need to protect public officials from litigation that could inhibit the discharge of their duties. *See Anderson* v. *Creighton,* 483 U.S. 635, 638 (1987). In balancing those needs, we use a three step analysis. *See Suboh* v. *Dist. Attorney's Office of the Suffolk Dist.,* 298 F.3d 81, 90 (1st Cir. 2002).

1. Violation of a Constitutional Right

The first step is to ask whether the facts alleged by the plaintiffs show that the conduct of the public officials violated a constitutional right. *See Saucier* v. *Katz,* 533 U.S. 194, 201 (2001); *Wilson* v. *Layne,* 526 U.S. 603, 609 (1999). The district court's decision, and our affirmance, in Roberts' earlier lawsuit makes clear that Rhode Island's strip and visual body cavity searches without reasonable suspicion violated a constitutional right. *See Roberts,* 239 F.3d at 113; *Roberts,* 175 F. Supp.2d at 183.

2. Clearly Established

The second step is to ask "whether that right was clearly established at the time of the alleged violation." *Conn* v. *Gabbert,* 526 U.S. 286, 290 (1999). The purpose of this step is "to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful." *Saucier,* 533 U.S. at 206. This means that in the present case we must determine whether it was the clearly established law that prison officials needed at least reasonable

suspicion before subjecting the plaintiffs to strip and visual body cavity searches.

The district court held that the law was not clearly established. In doing so, the district court based its decision largely on our statement in Roberts' earlier appeal that "[t]he institutional security concerns in play here fall somewhere between" other cases that have been decided by this court. *Roberts,* 239 F.3d at 111. The district court concluded from our statement that the unlawfulness of the ACI strip search policy could not have been apparent to the defendants. After careful examination, we think the district court assigned too much meaning to our statement. The statement simply recognizes that the facts involved in this case are different than those of previous cases. The Supreme Court recently explained in *Hope* v. *Pelzer,* 122 S. Ct. 2508, 2516 (2002), that "officials can still be on notice that their conduct violates established law even in novel factual circumstances."

In the same vein, the district court concluded that cases from other circuits were of "limited application" to its analysis because they involved different factual predicates than the present case. Specifically, the district court said that cases from other circuits "do not involve institutions designed like the ACI, where pretrial detainees are mixed in with the general prison population." To support its conclusion, the district court relied on reasoning from the Eleventh Circuit, which had developed a line of decisions that found the law "clearly established" only when the facts of previous cases were materially similar to the present case. *See Hope* v. *Pelzer,* 240 F.3d 975, 981 (11th Cir. 2001); *Suissa* v. *Fulton County, Ga.,* 74 F.3d 266, 269-70 (11th Cir. 1996); *Lassiter* v. *Alabama A & M Univ., Bd. of Trustees,* 28 F.3d 1146, 1150 (11th Cir. 1994).

Shortly after the district court's decision, the Supreme Court in *Hope* explicitly overruled the cases from the Eleventh Circuit upon which the district court relied. *See* 122 S. Ct. at 2515. The Supreme Court said that considering only those cases with similar facts, as the district court did here, is a "rigid gloss on the qualified immunity standard . . . [that] is not consistent with our cases." *Id.* The Court further stated that "[a]lthough earlier cases involving 'fundamentally similar' facts can provide especially strong support for a conclusion that the law is clearly established, they are not necessary to such a finding." *Id.* Our cases are consistent with the Court's decision in *Hope*. *See Hatch* v. *Dep't for Children, Youth and Their Families,* 274 F.3d 12, 22 (1st Cir. 2001); *El Dia, Inc.* v. *Rossello,* 165 F.3d 106, 109 (1st Cir. 1999); *Germany* v. *Vance,* 868 F.2d 9, 16 (1st Cir. 1989).

We therefore conclude that the district court's analysis was flawed because it overemphasized our statement in Roberts' earlier appeal and failed to properly weigh relevant decisions from other circuits. We consider it unnecessary, however, to remand this matter to the district court because the question of whether a right is clearly established is an issue of law. *See Singh* v. *Blue Cross/Blue Shield of Mass., Inc.,* 308 F.3d 25, 35 (1st Cir. 2002) ("[Q]ualified immunity analysis under § 1983 involves a quintessential legal question: whether the rights at issue are clearly established."). We instead proceed on our own to determine whether our cases, as well as those from other circuits, clearly established that reasonable suspicion was needed before prison officials could subject people arrested for minor offenses to strip and visual body cavity searches.

We begin by noting that our inquiry is time-sensitive. *See Hatch,* 274 F.3d at 22. Qualified immunity is available to the defendants if, at the time of the alleged violations, the law was not clearly established. *See id.* The parties all agree that the operative date for our analysis is March 17, 2000.

"One tried and true way of determining whether [a] right was clearly established . . . is to ask whether existing case law gave the defendants fair warning that their conduct violated the plaintiff's constitutional rights." *Suboh,* 298 F.3d at 93. After thoroughly reviewing the law, we find that existing cases gave the defendants plenty of fair warning that, prior to March 17, 2000, reasonable suspicion was needed in order to subject people arrested for minor offenses to strip and visual body cavity searches.

The place to start our analysis is with the Supreme Court's decision in *Bell* v. *Wolfish,* 441 U.S. 520 (1979). In that case, the Court upheld a strip and visual body cavity search of pretrial detainees. In doing so, the Court conducted an analysis that balanced the need for the searches against the invasion of personal rights. *Id.* at 559. Although the Court said that the practice of strip searching individuals "instinctively gives us the most pause," it found the searches constitutional because of the security needs of the prison. *Id.* at 559-60, 99 Sect. 1861. But the Court was clear to delineate the scope of its holding:

> [W]e deal here with the question whether visual body-cavity inspections . . . can *ever* be conducted on less than probable cause. Balancing the significant and legitimate security interests of the institution against the privacy interests of the inmates, we conclude that they can.

Id. at 560 (emphasis in original). In other words, *Bell* established the ceiling; it made clear that prison officials did not necessarily need probable cause to strip search pretrial detainees. But *Bell* left the floor undefined. Still ambiguous was whether prison officials needed any level of particularized suspicion that detainees were carrying contraband or weapons before conducting strip searches.

Our early cases applying *Bell* to the prison environment dealt largely with situations involving prison visitors. In one of our first prison visitor cases, *Blackburn* v. *Snow,* 771 F.2d 556, 567 (1st Cir. 1985), we held that:

> [T]he Constitution requires a more particularized level of suspicion to justify the humiliating and intrusive searches conducted here. While we need not define here precisely what level of individualized suspicion is required . . . a rule unabashedly requiring none cannot be reconciled with the Fourth Amendment.

See also Cochrane v. *Quattrocchi,* 949 F.2d 11, 13 (1st Cir. 1991).

In *Wood* v. *Clemons,* 89 F.3d 922, 928 (1st Cir. 1996), we clarified that the level of particularized suspicion required before subjecting prison visitors to strip searches was "reasonable suspicion." We said that "a strip search cannot be justified absent some quantum of *individualized suspicion.* In determining the *level* of individualized suspicion . . . courts have converged upon one common benchmark: the standard of 'reasonable suspicion.'" *Id.* (emphasis in original) (citations omitted).

Our cases addressing strip and visual body cavity searches were not limited to prison visitors. We required reasonable suspicion for strip searches at border crossings.

See United States v. *Uricoechea-Casallas,* 946 F.2d 162, 166 (1st Cir. 1991). And most significantly for this case, we demanded in *Swain* v. *Spinney,* 117 F.3d 1, 7 (1st Cir. 1997), that prison officials possess reasonable suspicion to conduct strip and visual body cavity searches of arrestees.

In *Swain,* we examined our prior cases dealing with prison visitors and border searches, as well as relevant cases from other circuits. We concluded that "it is clear that at least the reasonable suspicion standard governs strip and visual body cavity searches in the arrestee context as well." *Id.* This ruling was consistent with cases from numerous other circuits. *See Justice* v. *City of Peachtree City,* 961 F.2d 188, 193 (11th Cir. 1992); *Masters* v. *Crouch,* 872 F.2d 1248, 1255 (6th Cir. 1989), *cert. denied,* 493 U.S. 977 (1989); *Weber* v. *Dell,* 804 F.2d 796, 802 (2d Cir. 1986), *cert. denied,* 483 U.S. 1020 (1987); *Jones* v. *Edwards,* 770 F.2d 739, 742 (8th Cir. 1985); *Stewart* v. *Lubbock County, Tex.,* 767 F.2d 153, 156-57 (5th Cir.), *cert. denied,* 475 U.S. 1053 (1985); *Giles* v. *Ackerman,* 746 F.2d 614, 618 (9th Cir. 1984), *cert. denied,* 471 U.S. 1053 (1985); *Hill* v. *Bogans,* 735 F.2d 391, 394 (10th Cir. 1984); *Mary Beth G.* v. *City of Chicago,* 723 F.2d 1263, 1273 (7th Cir. 1983); *Logan* v. *Shealy,* 660 F.2d 1007, 1013 (4th Cir. 1981), *cert. denied,* 455 U.S. 942 (1982).

Not only did we hold in *Swain* that reasonable suspicion was required to strip search arrestees, we also determined when analyzing the issue of qualified immunity that "it was *clearly established* at the time of the search [May 18, 1993] that the Fourth Amendment requires at least a reasonable suspicion to conduct these types of searches." 117 F.3d at 5 (emphasis added). This ruling too was in accord with decisions by other circuits. *See Chapman* v. *Nichols,* 989 F.2d 393, 398 (10th Cir. 1993) (holding

that it was clearly established that a strip search policy applied to minor offense detainees without particularized reasonable suspicion was unlawful); *Masters,* 872 F.2d at 1255 ("The decisions of all the federal courts of appeals that have considered the issue reached the same conclusion: a strip search of a person arrested for a traffic violation or other minor offense not normally associated with violence and concerning whom there is no individualized reasonable suspicion that the arrestee is carrying or concealing a weapon or other contraband, is unreasonable. We believe the right of such a person to be free of such a search was 'clearly established' on October 21, 1986."); *Weber,* 804 F.2d at 803 (denying qualified immunity for defendants who performed suspicionless strip searches on arrestees because "at least eleven circuit court decisions . . . hold similar policies unconstitutional"); *Jones,* 770 F.2d at 742 n.4 (denying defendants qualified immunity because the Fourth Amendment's protection against suspicionless strip searches of arrestees was well established). In short, the defendants had more than fair warning that, prior to March 17, 2000, prison officials needed reasonable suspicion that arrestees for minor offenses, like the plaintiffs in this case, were concealing contraband or weapons before conducting strip and visual body cavity searches.

The defendants' principal argument is that, despite the overwhelming precedent described above, it was still unclear whether reasonable suspicion was required when arrestees were commingled with a general prison population, as was the case at the ACI facilities.

Admittedly, our precedent does not speak to commingling specifically. But as early as *Blackburn,* we rejected the argument that "the security needs of a prison can, *standing alone,* properly justify the 'complete withdrawal'

of Fourth Amendment rights from *all* who enter [a prison]." 771 F.2d at 563 (emphasis in original); *see also Logan,* 660 F.2d at 1013 ("An indiscriminate strip search policy routinely applied to detainees . . . cannot be constitutionally justified simply on the basis of administrative ease in attending to security considerations.").

Cases from other circuits are more explicit; they refute the defendants' argument with such clarity that we have little trouble concluding that, when read in conjunction with our opinions, the defendants had fair warning that commingling alone could not justify suspicionless strip searches of arrestees. Most notable is the Sixth Circuit's holding in *Masters* v. *Crouch,* 872 F.2d 1248, 1254 (6th Cir. 1989):

> [T]he fact of intermingling [with other prison inmates] alone has never been found to justify such a search without consideration of the nature of the offense and the question of whether there is any reasonable basis for concern that the particular detainee will attempt to introduce weapons or other contraband into the institution.

Other circuits too have found commingling to be an insufficient basis upon which to abandon the need for reasonable suspicion. The Second Circuit in *Walsh* v. *Franco,* 849 F.2d 68, 69 (2d Cir. 1988), ruled that a blanket strip search of all misdemeanor arrestees was not permissible simply because those arrestees were commingled among arraigned inmates. The court explained that "the risk of a misdemeanor arrestee's introducing contraband into the general jail population simply did not warrant a strip search of all arrestees and that particularized suspicion is required for strip-searching any person arrested for a misdemeanor or other minor offense." *Id.*

The Ninth Circuit in *Giles* v. *Ackerman,* 746 F.2d 614, 618 (9th Cir. 1984), adopted similar logic. The court explained that blanket strip search policies cannot deter arrestees from smuggling contraband into a jail because arrests are unplanned events. *Id.* The court concluded "that defendants' heavy reliance on the intermingling of its temporary detainees with the general [jail] population is misplaced because such intermingling is both limited and avoidable." *Id.* at 619 (citation and internal quotation marks omitted) (alteration in original). The Tenth Circuit has held to the same effect. *See Chapman,* 989 F.2d at 396 (rejecting the defendant's argument "that the invasion posed by his policy is justified by the need for jail security because women detainees must be incarcerated in one cell with the general jail population"); *Hill,* 735 F.2d at 394 (rejecting intermingling argument because "intermingling is only one factor to consider in judging the constitutionality of a strip search").

The defendants' final argument is that our decision in *Arruda* v. *Fair,* 710 F.2d 886 (1st Cir. 1983), made the law unclear regarding the need for reasonable suspicion when strip searching arrestees who would ultimately be commingled with other inmates in a maximum security prison. In *Arruda,* we upheld a policy of strip searching inmates at MCI-Walpole, a Massachusetts maximum security prison. *See id.* at 888. Nowhere in that opinion did we articulate a need for reasonable suspicion. The defendants say that ACI is a maximum security prison too, and therefore *Arruda* suggests that no reasonable suspicion is needed to conduct strip and visual body cavity searches of arrestees brought to ACI. This argument is unpersuasive for two reasons. First, as we have already discussed, our cases since *Arruda* have made clear that reasonable

suspicion is required to strip search arrestees. *See Swain,* 117 F.3d at 7. Second, *Arruda* was a case involving "particularly dangerous prisoners." 710 F.2d at 887. The plaintiff himself was a convicted felon assigned to a special cell block, which we described as a "prison within a prison, designed to hold the most dangerous inmates." *Id.* The plaintiff was assigned to this special cell block for assaulting another prisoner. In addition, the plaintiff testified that, while a prisoner, he possessed drugs and a weapon. *Id.* at 888.

Based on these facts, we have no difficulty concluding that the defendants could not rely on *Arruda* to justify their actions. It is simply not reasonable to equate people arrested for non-violent, non-drug related minor offenses with a convicted felon who, while incarcerated, possessed contraband and a weapon, assaulted a fellow prisoner, and was confined to a special cell block designed to hold dangerous inmates.

In light of our prior case law, as well as decisions from other circuits, we conclude that the defendants had fair warning that subjecting arrestees for minor offenses to strip and visual body cavity searches without any reasonable suspicion was a violation of the Fourth Amendment, even though the arrestees were commingled with other inmates. The law was clearly established for purposes of qualified immunity.

3. Objective Reasonableness

Having concluded that the law clearly established the plaintiffs' right to be free from suspicionless strip and visual body cavity searches, we now address the third and

final step in the qualified immunity analysis. The defendants are entitled to qualified immunity if objectively reasonable prison officials in the defendants' position would believe that their conduct was lawful in light of clearly established law. *See Suboh,* 298 F.3d at 95; *Swain,* 117 F.3d at 9. This is a legal question, but we have repeatedly recognized that "[a] determination of objective reasonableness 'will often require examination of the information possessed' by the defendant officials." *Kelley* v. *LaForce,* 288 F.3d 1, 7 (1st Cir. 2002) (quoting *Anderson,* 483 U.S. at 641); *see also Bilida* v. *McCleod,* 211 F.3d 166, 174 (1st Cir. 2000); *Sheehy* v. *Town of Plymouth,* 191 F.3d 15, 19 (1st Cir. 1999); *McBride* v. *Taylor,* 924 F.2d 386, 389 (1st Cir. 1991); *Floyd* v. *Farrell,* 765 F.2d 1, 6 (1st Cir. 1985).

Mindful that the reasonableness inquiry is "highly fact specific," *Swain,* 117 F.3d at 9, any determination we make would require examining the record for evidence that the defendants had reasonable suspicion, albeit mistakenly, that the plaintiffs were concealing contraband or weapons. Reasonable suspicion can arise from a wide variety of circumstances, including "the crime charged, the particular characteristics of the arrestee, and/or the circumstances of the arrest." *Weber,* 804 F.2d at 802; *Giles,* 746 F.2d at 617; *see also Roberts,* 239 F.3d at 113 (stating that reasonable suspicion can be based on "observations of a particular inmate during a less invasive pat-down frisk and clothing search, or based on contraband found during that search").

The record before us, however, is barren of any facts regarding what the prison officials knew, or did not know, about the plaintiffs. The only facts we have are those from the parties' pleadings and those facts contained in the

decisions by this court and the district court in Roberts' first round of litigation. The facts developed there were based on a "joint factual stipulation" submitted by the parties to the district court. The record now before us does not contain the joint factual stipulation. Even if it did, the joint stipulation pertains only to Roberts. As far as we can tell, the parties have not stipulated to all the facts regarding any of the other plaintiffs. Given the state of the record, we must remand this case to the district court for a determination of the third step in the qualified immunity analysis, as well as the other issues in the litigation.

III. CONCLUSION

The law was clearly established on March 17, 2000, that people arrested for non-violent, non-drug related minor offenses could not be subjected to strip and visual body cavity searches absent reasonable suspicion that they were concealing contraband or weapons, even when those arrestees were commingled with general prison populations. The district court's decision granting qualified immunity to the defendants-appellees is therefore **REVERSED** and the case is **REMANDED** for further proceedings consistent with this opinion. Costs on appeal are awarded to plaintiffs-appellants.

So ordered.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

ANGELA SAVARD, LISA RONCI, PRISCILLA HARRIS, CRAIG L. ROBERTS, SR., REBECCA DORSEY, KENNETH LOWER, JR., ROBERT DULL, STEPHANIE CLARKE, MISTY TOLLESON, GEORGE BARBER, WILLIAM CARCIERI, SAMMY FARLAND, STEVEN FUSCO, JEFFREY LARISA, CHARLES SANCHEZ, RICHARD SQUIRES, ANITA TARCZUK, NABBIL RASHID, and KEVIN MANCIERI, individually and on behalf of others similarly situated

v. C.A. No. 00-261 ML

THE STATE OF RHODE ISLAND, GEORGE A VOSE, JR., individually and in his former capacity as Director of the R.I. Department of Corrections, A.T. Wall, II, individually and in his capacity as Director of the R.I. Department of Corrections, WILLIAM CUDSWORTH individually in his capacity as Acting Warden of the Intake Services Center at the Adult Correctional Institutions, ALBERT GARDINER individually and in his former capacity as Warden of the Intake Services Center at the Adult Correctional Institutions, ROBERTA RICHMAN, individually and in her capacity as the Warden of the Women's Facility at the Adult Correctional Institutions, PAUL M. KENNEDY,

individually and in his capacity as Chief of Recruitment and Training of the R.I. Department of Corrections, and, JOHN DOE and JANE DOE being persons responsible for training and administration at the Adult Correctional Institutions whose identities will become known to the plaintiffs in the course of discovery

MEMORANDUM AND ORDER

Plaintiffs Angela Savard, et al., on behalf of themselves and all others similarly situated[1] ("Plaintiffs") have filed a multi-count complaint against the State of Rhode Island and several of its employees seeking damages for strip searches performed during various pretrial commitments at the Adult Correctional Institutions ("ACI") in Cranston, Rhode Island. This matter is now before the Court on the individual Defendants' Motion for Summary Judgment

I. Facts and Travel of the Case

The Rhode Island Department of Corrections ("DOC") operates the ACI, which consists of seven separate facilities. One of the seven facilities is the Intake Service Center ("Intake"), which serves as the receiving facility for all males committed to the care, custody, and control of the DOC. Females committed to the care, custody, and control of the DOC do not pass through Intake, instead they are

[1] On September 15, 2000, Plaintiffs filed a Motion to Certify Class with this Court. That motion is still pending.

brought directly to the Women's Facility at the ACI. The ACI, including Intake and the Women's Facility, is designated a maximum security prison.

Detainees housed at Intake fall into several categories: pretrial detainees, newly sentenced inmates who are awaiting classification to other facilities, pretrial protective custody detainees, and sentenced inmates who are under protective custody. Individuals who are confined in Intake are allowed out of their cells for approximately eight hours each day. During the time they are out of their cells they commingle with other detainees in the dining hall, the recreation areas, the library, the medicine lines, the laundry, the store, and the visiting area. They also commingle with other detainees when they are transported to and from court, and in the holding areas at the courthouses. Detainees who are held in protective custody are segregated from other detainees, however, they use the same physical facilities (such as the recreation areas and the library) as the general population, albeit at different times.

Pretrial detainees who are committed to the Women's Facility after proceeding through the commitment process are housed with and commingled with the general population.

Rhode Island's prison system has been described by the First Circuit as a "unified prison system" in which there are no separate "regional facilities to house pretrial detainees prior to trial and sentencing." *Roberts v. Rhode Island*, 239 F.3d 107, 109 (1st Cir. 2001). Instead, under Rhode Island's "unified" prison system, all pretrial detainees intermingle with the general prison population.

The United States Marshals Service, United States Immigration and Naturalization Service, Rhode Island State Police, local police departments, and sheriffs all bring detainees to Intake and the Women's Facility. Prior to March 17, 2000, each male committed to Intake and each female committed to the Women's Facility was subject to a strip search in accordance with two policies promulgated by the DOC.[2]

By order dated March 17, 2000, and amended March 24, 2000, this Court declared the strip search policy of Intake unconstitutional as applied to pre-arraignment detainees. *Roberts v. Rhode Island*, No. 99-259ML, slip op. (D. R.I. March 17 and 24, 2000). That decision was affirmed by the First Circuit. *Roberts*, 239 F.3d 107.

On May 30, 2000, Plaintiffs filed this lawsuit on behalf of all persons strip-searched at the ACI prior to March 17, 2000, after being arrested for "nonviolent, non-drug related minor offenses." Plaintiffs allege that the Defendants subjected them to strip searches in violation of the Fourth, Fifth, Eighth, Ninth, and Fourteenth Amendments to the United States Constitution and 42 U.S.C.

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[2] Some detainees were not subjected to a strip search pursuant to the policy in place. If a detainee was bailed out of the facility within a "very short" period of time he did not enter the general population and was therefore not subjected to the routine strip search. (Neither the policy nor the Defendants provide a precise definition of what constitutes a "very short" period of time. This Court takes it to mean that anyone bailed out before interacting with the general population was not subjected to a strip search.) For a detailed description of the strip search policies followed by the ACI prior to March 17, 2000, the reader is directed to this Court's opinion in *Roberts v. Rhode Island*, No. 99-259ML, slip op. at 5-7 (D. R.I. March 17, 2001).

§ 1983. The individual Defendants argue that they are entitled to judgment as a matter of law because they are protected from liability by the defense of qualified immunity.

II. Standard of Review

In deciding a motion for summary judgment, this Court's take is to "determine 'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" *Barreto-Rivera v. Medina-Vargas*, 168 F.3d 42, 45 (1st Cir. 1999) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986)). The Court therfore "view[s] all facts and draw[s] all inferences in the light most favorable to the nonmoving party." *Reich v. John Alden Life Ins. Co.*, 126 F.3d 1, 6 (1st Cir. 1997).

Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). To be "genuine," the evidence viewed in a light most favorable to the non-moving party "must be sufficiently open-ended to permit a rational factfinder to resolve the issue in favor of either side." *Nat'l Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir. 1995).

The moving party bears the burden of showing the Court that no genuine issue of material fact exists. *See id.* Once the movant has made the requisite showing, the nonmoving party "may not rest upon the mere allegations or denials of [its] pleading, but . . . must set forth specific

facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e).

III. Discussion

"Qualified immunity operates to shield government officials exercising discretionary powers 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Morales v. Ramirez*, 906 F.2d 784, 787 (1st Cir. 1990) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800 (1982)) "[T]he determination of a claim of qualified immunity is 'independent of the merit of the underlying constitutional claim.'" *Cookish v. Powell*, 945 F.2d 441, 443 (1st Cir. 1991) (quoting *Morales*, 906 F.2d at 787).

> 'Because qualified immunity does not address the substantive viability of [the asserted] claim, but rather the objective reasonableness of a defendant's actions, a plaintiff who is entitled to prevail on the merits is not necessarily entitled to prevail on the issue of qualified immunity.' The flip side [of this], however, is that a defendant who is entitled to prevail on the underlying issue is necessarily entitled to prevail on the issue of qualified immunity.

Morales, 906 F.2d at 787 (quoting *Collins v. Marina-Martinez*, 894 F.2d 474, 478 (1st Cir. 1990)).

Analysis of a qualified immunity defense is a three step process. "A court evaluating a claim of qualified immunity 'must first determine whether the plaintiff has alleged the deprivation of an actual constitutional right at all, and if so, proceed to determine whether that right was

clearly established at the time of the alleged violation.'" *Wilson v. Layne*, 526 U.S. 603, 609 (1999) (quoting *Conn v. Gabbert*, 526 U.S. 286, 290 (1999)) "Only if these two questions are answered in the affirmative does the court address the particular conduct in question." *Abreu-Guzman v. Ford*, 241 F.3d 69, 73 (1st Cir. 2001).

A. *Constitutional Violation Analysis*

The Plaintiffs in this case suffered the deprivation of an actual constitutional right, as evidenced by this Court's opinion in *Roberts* and the First Circuit's subsequent affirmance. *See Roberts*, 239 F.3d at 113 ("Standing alone, the security concerns of the Intake facility cannot support the search policy . . . as it applies to minor offenses. The policy is unconstitutional under the Fourth Amendment."). Thus, the first part of the qualified immunity test is satisfied. This Court must now determine "whether the constitutional right asserted by the plaintiff[s] was 'clearly established' at the time of the alleged violation." *St. Hilaire v. City of Laconia*, 71 F.3d 20, 24 (1st Cir. 1995) (citing *Hegarty v. Somerset County*, 53 F.3d 1367, 1373 (1st Cir. 1995)).

B. *Clearly Established / Objectively Reasonable Analysis*

> [G]overnment officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. . . . If the law at [the time of the offense] was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could

> he fairly be said to "know" that the law forbade conduct not previously identified as unlawful.

Harlow, 457 U.S. at 818.

In *Anderson v. Creighton* the Supreme Court refined the term "clearly established" to require a more particular statement of the law. 483 U.S. 635 (1987). In evaluating the qualified immunity claim of an FBI agent who conducted a warrantless search of a private home, the *Anderson* Court noted that too broad a ruling of *Harlow* could potentially "transform" the qualified immunity defense because any statement of a constitutional right might be interpreted to have clearly established what was in actuality an extension of that right. *Id.* at 639. "Plaintiffs would be able to convert the rule of qualified immunity that our cases plainly establish into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights." *Id.* Such an interpretation would prevent government officials from invoking a qualified immunity defense in circumstances where the plaintiff's cause of action is similar, but distinguishable, from an established right. *Id.* To avoid this situation, the Supreme Court formulated a narrower standard:

> the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but

> it is to say that in the light of pre-existing law the unlawfulness must be apparent.

Id. at 640 (citations omitted).

In light of *Anderson*, the second and third prongs of a qualified immunity defense are inexorably intertwined, for a right is clearly established for the sake of a defendant's qualified immunity defense when it "is stated with sufficient particularity so that a 'reasonable officer would understand that what he is doing violates that right.'" *Soto v. Flores*, 103 F.3d 1056, 1064 (1st Cir. 1997) (quoting *Souza v. Pina*, 53 F.3d 423, 425 (1st Cir. 1995)). Thus, in this case, the right must have been clearly established at the time the Plaintiffs were strip searched. If this Court determines that the right to be free from strip searches in a non-segregated intake facility was clearly established during the class period, only then must it evaluate whether "a reasonable, similarly situated official [would have understood] that the challenged conduct violated that established right." *Swain v. Spinney*, 117 F.3d 1, 9 (1st Cir. 1997) (citing *St. Hilaire*, 71 F.3d at 24).

"It could plausibly be asserted that any violation of the Fourth Amendment is 'clearly established.' Since it is clearly established that the protections of the Fourth Amendment apply to the actions of the [state actor] . . . . However, as . . . explained in *Anderson*, the right allegedly violated must be defined at the appropriate level of specificity before a court can determine if it was clearly established." *Wilson*, 526 U.S. at 615 (citing *Anderson*, 483 U.S. at 641). The First Circuit has determined that "the phrase 'clearly established' has a well-defined meaning. It denotes that at the time the challenged conduct occurred the contours of the right were sufficiently plain that a

reasonably prudent state actor would have realized not merely that his conduct might be wrong, but that it violated a particular constitutional right." *Martinez v. Colon*, 54 F.3d 980, 988 (1st Cir. 1995).

The unique structure of the Rhode Island prison system complicates this Court's task of determining whether the right to be free from strip searches at the ACI was defined at the appropriate level of specificity to be considered clearly established prior to March 17, 2000. Defendants argue that the right to be free from a strip search when entering a maximum security facility to be commingled with the general population was not clearly established in this Circuit (or in any other) until February 13, 2001, the date of the First Circuit's ruling in *Roberts*. Thus, they argue, Plaintiffs fail to meet the second prong of the qualified immunity test. It is necessary, therefore, for this Court to survey those Supreme Court and First Circuit decisions that preceded this Court's March 17 and 24, 2000, orders on the question of strip searches of pretrial detainees.

In *Bell v. Wolfish*, the Supreme Court held that a policy which required the strip search of all pretrial detainees who had had a contact visit with someone from outside the facility did not violate the Fourth Amendment's prohibition of unreasonable searches. 441 U.S. 420 (1970). On the question of what constitutes "reasonableness," the Court stated:

> [t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of

> the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.

Id. at 559. The Court noted that detention facilities are "fraught with serious security dangers," including the "[s]muggling of money, drugs, weapons, and other contraband. . . ." *Id.* After balancing the need for the particular search (institutional security) against the privacy interests of the inmates, the Supreme Court concluded that the mandatory strip search regulation passed constitutional muster. *Id.* at 558-60.

It is important to note that the *Bell* Court did not validate an across-the-board indiscriminate strip search policy like the one the Defendants employed in this case. The searches in *Bell* were triggered by specifically articulated events, namely contact visits with people from outside the prison. The First Circuit found this distinction to be significant in *Roberts* "it is far less likely that smuggling of contraband will occur subsequent to an arrest than during a contact visit that may have been arranged solely for the purpose of introducing contraband to the prison population," 239 F.3d at 111.

In *Arruda v. Fair* the First Circuit found that a policy which required strip searches of sentenced inmates at a special maximum security unit within a prison ("a prison within a prison") upon leaving and re-entering the unit on their way to and from the prison law library and infirmary, and after visits where a wire security screen separated the inmate from his outside visitor, did not violate the Fourth Amendment. 710 F.2d 886, 887 (1st Cir. 1983). The court noted that the particular institution involved held the "most dangerous inmates" and that it had a lengthy, documented history of "contraband problems,

including prisoner possession of both drugs and weapons." *Id.* at 887-88. Again, however, the policy required searches only upon the occurrence of certain specifically articulated events going to and from the library and the infirmary and visiting with people from outside the prison.

By contrast, in *Swain v. Spinney*, the Court of Appeals found that as a result of the absence of an institutional security justification, a strip search of an arrestee who had been pat-frisked and then placed alone in a police station cell violated the arrestee's Fourth Amendment right to be free from unreasonable searches. 117 F.3d 1 (1st Cir. 1997). The court noted that "the most compelling justification for warrantless strip and visual body cavity searches is institutional security," but that in Swain's case "[t]here was no risk that she would come into contact with other prisoners, or be able to smuggle contraband or weapons into a secure environment." *Id.* at 8.

The defendants in *Roberts* argued that the commingling of the pretrial detainees with the general prison population justified the strip search policy. The Court of Appeals, however, held that '[s]tanding alone, the security concerns of the Intake facility cannot support the search policy . . . as it applies to minor offenses." 239 F.3d at 113.

In this case, Defendants argue that the *Roberts* holding established for the first time that the security concerns of a "unified" prison system were insufficient to justify the policy of strip searching all detainees before they were commingled with general population inmates. In support of this argument, Defendants point to the First Circuit's observation that:

> [t]he institutional security concerns in play here fall somewhere between those exhibited in *Swain*,

> which were insufficient to support a search, and those in *Arruda* and *Bell*, which made broad-based searches without individual suspicion reasonable. For the reasons detailed below, we think that the Rhode Island policies fall on the *Swain* side of the constitutional line.

239 F.3d at 111. Defendants rely on this statement to support their contention that the law was not clearly established prior to the First Circuit's decision in *Roberts* and that therefore they are entitled to judgment under the doctrine of qualified immunity. This court agrees.

In nearly all of the cases that have dealt with the question of the constitutionality of strip searches in a prison environment, the need to preserve and maintain institutional security has been recognized by Courts as a "legitimate need of law enforcement." *Roberts*, 239 F.3d at 111. Courts have further indicated that this need for institutional security "has been found to be a compelling reason for conducting warrantless strip and visual body cavity searches" absent reasonable suspicion of individual wrongdoing. *Swain*, 117 F.3d at 7. Moreover, in the *Roberts* decision, the First Circuit took note that other courts in earlier decisions had identified the '[i]ntermingling of inmates [as] a serious security concern that weigh[ed] in favor of the reasonableness, and constitutionality, of the search." 239 F.3d at 112 (citations omitted).

While "[t]he Fourth Amendment right to be free from reasonable strip searches has long been clearly established in this circuit, as elsewhere," *Swain*, 117 F.3d at 9, the precise "contours of [that] right [had not been] sufficiently clear" so that the unlawfulness of the action would be apparent to a reasonable official. *Anderson*, 483 U.S. at 640. The very term "unreasonable" requires judicial

definition in a "particularized" sense. *Id.* Where, as where, the reasonableness or unreasonableness of state action turns in large measure on the intersecting facts of commingling detainees with general population inmates in a maximum security prison, a unique situation among those considered by the courts, the unlawfulness of the Rhode Island strip search policy could not have been apparent until the First Circuit issued its ruling in *Roberts*.

Plaintiffs argue that this Court should look outside the First Circuit for decisional law that clearly establishes their right to be free from strip searches at the ACI. "In the absence of binding precedent, a court should look at all available decisional law including decisions of . . . other . . . circuits and district courts." *Norfleet v. Arkansas Dep't of Human Servs.*, 989 F.2d 289, 291 (8th Cir. 1993) (citations omitted). *See also Lum v. Jensen*, 876 F.2d 1385, 1387 (9th Cir. 1989) ("A right can be clearly established even though there was no binding precedent in this circuit. Absent binding precedent, we look to all available decisional law, including the law of other circuits and district courts, to determine whether the right was clearly established."). Furthermore "a violation of clearly settled law may be found even where the Supreme Court and the circuit in question have not specifically addressed the question." *Soto*, 103 F.3d at 1065.

This Court has considered the cases relied on by the Plaintiffs, however, those cases have limited application to the case now before this Court, as they do not involve institutions designed like the ACI, where pretrial detainees are mixed in with the general prison population. In fact, in one of the cases cited by the Plaintiffs, the Fourth Circuit specifically noted that "[a]t no time would [the plaintiff] or similar detainees be intermingled with the

general jail population. . . ." *Logan v. Shealy*, 660 F.2d 1007, 1003 (4th Cir. 1981).

"For qualified immunity to be surrendered, pre-existing law must dictate, that is, truly compel (not just suggest or allow or raise a question about), the conclusion for every like-situated, reasonable government agent that what defendant is doing violates federal law *in the circumstances*." *Lassiter v. Alabama A&M Univ. Bd. of Trs.*, 28 F.3d 1146, 1150 (11th Cir. 1994). This court finds that at the time the strip searches were conducted on the Plaintiffs, the contours of the right were not "sufficiently plain [such] that a reasonably prudent state actor would have realized not merely that his conduct might be wrong, but that it violated a particular constitutional right." *Martinez*, 54 F.3d at 988. Nor was the law "developed in such a factually defined context that the individual defendants should have been aware that they were acting illegally when they either ordered or performed the searches in question." *Thomas v. Roberts*, 261 F.3d 1160, 1171 (11th Cir. 2001) (footnote omitted) (holding that strip searches performed by teacher and police officer were unreasonable, but individual defendants were entitled to qualified immunity).

Since this Court had determined that the Plaintiffs' right to be free from strip searches at the ACI prior to March 17, 2000 was not clearly established, it need not reach the final question in the qualified immunity analysis – namely whether a reasonable official should have understood that the challenged conduct violated an established right.

Plaintiffs have also claimed violations of the Fifth, Eighth, and Ninth Amendments, however, they have not

developed any argument pertaining to these claims. This Court therefore considers any argument they might have regarding these alleged violations to be waived.

IV. Conclusion

For the reasons outlined in the text of this memorandum, the individual Defendants' Motion for Summary Judgment is granted.

SO ORDERED

/s/ Mary M. Lisi
Mary M. Lisi
United States District Judge
April 12, 2002

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

ANGELA SAVARD, LISA RONCI, PRISCILLA HARRIS, CRAIG L. ROBERTS, SR., REBECCA DORSEY, KENNETH LOWE, JR, ROBERT DULL, STEPHANIE CLARKE, MISTY TOLLESON, GEORGE BARBER, WILLIAM CARCIERI, SAMMY FARLAND, STEVEN FUSCO, JEFFREY LARISA, CHARLES SANCHEZ, RICHARD SQUIRES, ANITA TARCZUK, NABIL RASHID and KEVIN MANCIERI, individually and on behalf of others similarly situated	:	
vs.	:	
THE STATE OF RHODE ISLAND, GEORGE A. VOSE, JR, individually and in his former capacity as Director of the R.I. Department of Corrections, A.T. WALL, II, individually and in his capacity as Director of the R.I. Department of Corrections; WILLIAM CUDSWORTH, individually and in his capacity as Acting Warden of the Intake Services Center at the Adult Correctional Institution; ALBERT GARDINER, individually and in his formerly capacity as Warden of the Intake Services Center at the Adult Correctional Institution; ROBERTA RICHMAN, individually and in her capacity as the Warden of the Women's Facility at the Adult	:	C.A. No. 00-261ML

Correctional Institution; PAUL M. KENNEDY, individually and in his capacity as Chief of Recruitment and Training of the R.I Department of Corrections; and, JOHN DOE and JANE DOE being persons responsible for training and administration at the Adult Correctional Institution whose identities will become known to the plaintiffs in the course of discovery :

JUDGMENT

Pursuant to the provision F.R.C.P. 54, the plaintiffs' complaint for declaratory judgment and injunctive relief against the State of Rhode Island is dismissed as moot and the plaintiffs' complaint against the individual defendants is dismissed based on this Court's decision of April 12, 2002 granting the individual defendants' motion for summary judgment.

ENTERED as an order of this Court on the 7th day of May, 2002.

SO ORDERED

_____
Clerk

Enter.

/s/ Mary M. Lisi
United States District Judge

May 7, 2002
Date

Presented by

/s/ Thomas W. Kelly
Thomas W. Kelly
For the plaintiffs

Supreme Court, U.S.
FILED
DEC 8 - 2003
OFFICE OF THE CLERK

No. 03-683

In The
Supreme Court of the United States

ANGELA SAVARD, et al.,

Petitioners,

v.

STATE OF RHODE ISLAND, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENTS' STATEMENT OF THE QUESTIONS PRESENTED

1. Whether the First Circuit articulated a new standard for qualified immunity at odds with *Hope v. Pelzer*, or whether the Circuit Court properly applied *Hope* to the present dispute.

2. Whether the absolute defense of qualified immunity is available to government officials faced with two distinct lines of decisional law, and who are ultimately determined to have chosen the "wrong fork in the road."

3. Whether the law was clearly established in the First Circuit prior to March 16, 2000, that strip searching pre-arraignment detainees incarcerated for minor non-violent, non-drug-related offenses at a maximum security prison facility housing a general prison population is unconstitutional under the Fourth Amendment.

TABLE OF CONTENTS

	Page
RESPONDENTS' STATEMENT OF THE QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
RESPONDENTS' STATEMENT OF THE CASE	1
SUMMARY OF RESPONDENTS' ARGUMENT	4
ARGUMENT	6
I. There Is No Compelling Reason To Grant Certiorari	6
II. The First Circuit Did Not Formulate A New Standard For The Application Of Qualified Immunity	7
III. The Defense Of Qualified Immunity Should Be Available To Government Officials Faced With Two Distinct Lines Of Caselaw, And Who Are Ultimately Determined To Have Chosen The Wrong "Fork In The Road"	9
IV. The Law Was Not Clearly Established, And Did Not Give Reasonable Prison Officials Fair Warning, That Prior To March 16, 2000 It Was Constitutionally Impermissible To Strip Search All Inmates Committed To The Care, Custody And Control Of A Maximum Security Facility Housing A General Prison Population	16
CONCLUSION	23

TABLE OF AUTHORITIES

Page

CASES:

Abreu-Guzman v. Ford, 241 F.3d 33 (1st Cir. 2001).....18

Anderson v. Creighton, 483 U.S. 635 (1987).....10

Arruda v. Fair, 710 F.2d 886 (1st cir. 1983).....*passim*

Bell v. Wolfish, 441 U.S. 520 (1979).....*passim*

Berthiaume v. Caron, 142 F.3d 12 (1st Cir. 1998).....17

Bilida v. McLeod, 211 F.3d 166 (1st Cir. 2000).....16

Block v. Rutherford, 468 U.S. 576 (1984).....10, 22, 23

Cochrane v. Quattrochi, 949 F.2d 11 (1st Cir. 1991).....22

DeAbadia v. Izquierdo Mova, 792 F.2d 1187 (1st Cir. 1986).....17, 18

Dobrowolsky v. Jefferson City, 823 F.2d 955 (6th Cir. 1987).....21

Dufrin v. Spreen, 712 F.2d 1084 (6th Cir. 1983).....21

Evans v. City of Zebulon, No. 02-16424 (11th Cir. 2003) 2003 WL 22707338.....21, 22

Harlow v. Fitzgerald, 457 U.S. 800 (1982)..... 11, 16, 18, 24

Hope v. Pelzer, 536 U.S. 730 (2002).....*passim*

Jenkins v. Talladega City Board of Education, 115 F.3d 821 (11th Cir. 1997).....17

Logan v. Shealey, 660 F.2d 1007 (4th Cir. 1981).....20

Malley v. Briggs, 475 U.S. 335 (1986).....16

McClendon v. City of Columbia, 305 F.3d 314 (5th Cir. 2002).....15

Mitchell v. Forsyth, 472 U.S. 511 (1985).....16, 17

Nelson v. Kline, 242 F.3d 33 (1st Cir. 2001).....18

TABLE OF AUTHORITIES – Continued

Page

Pierson v. Ray, 386 U.S. 547 (1967).....10

Roberts v. Rhode Island, 175 F.Supp. 2d 176 (D.R.I. 2000).....2, 3, 5, 9, 19

Roberts v. Rhode Island, 239 F.3d 107 (1st Cir. 2001).....2, 5, 10, 18, 19

Robles v. Prince George's County, Md., 302 F.3d 262 (4th Cir. 2002).....14

Robles v. Prince George's County, Md., 308 F.3d 437 (4th Cir. 2002).....15

Roscom v. City of Chicago, 570 F.Supp. 1259 (N.D. Ill. 1983).....21

Smith v. Mattox, 127 F.3d 1416 (11th Cir. 1997).....11

Swain v. Spinney, 117 F.3d 1 (1st Cir. 1997).....3, 9, 21

Thomas v. Roberts, 261 F.3d 1160 (11th Cir. 2001).....12

Thomas v. Roberts, 323 F.3d 950 (11th Cir. 2003) ("*Thomas II*").....13

Vinyard v. Wilson, 311 F.3d 1340 (11th Cir. 2002) 11, 15

Ward v. County of San Diego, 791 F.2d 1329 (9th Cir. 1986).....20

Watt v. City of Richardson, 849 F.2d 195 (5th Cir. 1988).....21

Westberry v. Fisher, 309 F.Supp. 12 (D. Me. 1970).....10

Willingham v. Loughnan, 321 F.3d 1299 (11th Cir. 2003).....11

Wilson v. Jones, 251 F.3d 1340 (11th Cir. 2001).....14, 22

Wilson v. Layne, 526 U.S. 603 (1999).....10

Wood v. Clemons, 89 F.3d 922 (1st Cir. 1996).....19, 20

TABLE OF AUTHORITIES – Continued

Page

STATUTES:

R.I. Gen. Laws §9-31-1 4

R.I. Gen. Laws §9-1-25 4

RESPONDENTS' STATEMENT OF THE CASE

The State of Rhode Island operates the Adult Correctional Institutions ("ACI"), comprised of seven facilities.[1] One of these facilities is the Intake Service Center ("Intake"). Intake is the receiving facility for all males committed to the care, custody and control of the Department of Corrections. Approximately 16,000 inmates are committed via Intake annually. The average length of a stay at Intake is 19.5 days. Only those individuals arrested on an outstanding warrant, ordered held without bail, or who are unable to post bail come to Intake. Individuals who are merely arrested, without more, are not brought there. Intake is a maximum security facility, with a secure, fenced perimeter staffed by correctional officers twenty-four hours a day, seven days a week.

The general population at Intake consists of pre-arraignment and pre-trial detainees, newly sentenced inmates awaiting classification, pre-trial protective custody detainees, and sentenced protective custody inmates. Inmates at Intake are out of their cells approximately eight hours each day, during which time those picked up on warrants such as these Petitioners come into contact with rapists, murderers, gang members and drug dealers. The strip searches at Intake have resulted in the discovery of contraband in the past.

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[1] The First Circuit mistakenly referred to all seven facilities as maximum security facilities – not all seven have that designation. However, it has no bearing on the present case since the Intake facility – in the spotlight in this case – *is* a maximum security facility.

Prior to the District Court's decision in *Roberts v. Rhode Island*, 175 F.Supp. 2d 176 (D.R.I. 2000), a policy mandated that each inmate committed to the care, custody and control of the Department of Corrections undergo a visual strip search. That decision declared that the policy violated the Fourth Amendment's prohibition on unreasonable searches. This policy was changed on the day that the District Court entered its decision, March 16, 2000.[2]

In *Roberts v. Rhode Island*, 239 F.3d 107 (1st Cir. 2001), the First Circuit Court of Appeals affirmed the District Court, and declared that the blanket strip search policy in effect at Intake prior to March 16, 2000 violated the Fourth Amendment.[3] The specific constitutional infirmity found was the application of the policy to all entering Intake, including pre-arraignment misdemeanor detainees. The State argued that because of the unique character of Intake – a maximum security facility housing pretrial detainees charged with a wide range of offenses, as well as newly sentenced inmates and some protective custody inmates, all there upon an order of the court – the policy of strip searching all inmates upon commitment was necessary and constitutionally permissible. The State relied upon, among others, the decisions in *Arruda v. Fair*, 710 F.2d 886 (1st Cir. 1983), and this Court's decision in *Bell v. Wolfish*, 441 U.S. 520 (1979), both of which allow strip searches in circumstances quite similar to those presented daily at Intake. *Roberts* cited with approval the

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[2] This fact should weigh in favor of denial of the instant petition.

[3] Qualified immunity was never an issue in that case, since because of pleading deficiencies, Roberts was entitled only to declaratory judgment.

First Circuit's decision in *Swain v. Spinney*, 117 F.3d 1 (1st Cir. 1997), which requires a showing of reasonable suspicion to strip search an individual in a single cell municipal jail.

In *Roberts*, the First Circuit agreed that the State's security concerns were legitimate and that the State had endeavored to perform the searches in a relatively private and non-intrusive manner, but ultimately found that the circumstances presented by Intake "fell somewhere between" those of *Arruda* and *Swain*. 239 F.3d at 111, 113. Based on that language, the governmental defendants in this case moved for summary judgment, asserting that the doctrine of qualified immunity barred all claims for damages.[4] Respondents (Defendants below) asserted that a reasonable prison official could not have known that implementing the strip search policy at Intake prior to *Roberts* violated the Fourth Amendment, and held that the action was barred by the doctrine of qualified immunity. On that basis, summary judgment was granted.

On appeal, a three-judge panel disagreed. However, an *en banc* court issued a 4-4 decision, ultimately affirming the District Court's grant of summary judgment on qualified immunity grounds. In its decision, the four justices who were in agreement with the District Court repeatedly discussed and ultimately applied this Court's decision in *Hope v. Pelzer*, 536 U.S. 730 (2002). The Court did not, as Petitioners would have this Court believe, abandon *Hope* and forge a new, more relaxed standard for

[4] Petitioners filed their Complaint after the District Court's decision in *Roberts* but before the First Circuit issued its opinion.

the imposition of qualified immunity. The Circuit and District Courts applied the correct standard, and came to the only supportable conclusion – that qualified immunity should act as a complete bar to the instant action.

SUMMARY OF RESPONDENTS' ARGUMENT

The instant request for the issuance of a petition for certiorari should be denied, since there is no compelling reason to do so. The First Circuit did not abandon this Court's teachings in *Hope*, or that contained in prior precedent from this Court, or from the First Circuit. To the contrary, the Circuit Court correctly articulated, interpreted, and applied *Hope* in determining that qualified immunity was appropriately afforded to these prison officials. Petitioners would have this Court find that simply by using the phrase "clear guidance" at the end of its opinion, in *dicta* explaining their application of *Hope*, the Circuit Court abandoned all applicable caselaw and effectively encouraged government officials throughout the Northeast to abuse the constitutional rights of citizens. A simple reading of the decision is the best rebuttal of that argument.

Further, the unique nature of the Intake facility, the cornerstone of the officials' argument at the District and Circuit levels, counsels against granting certiorari in this case. The First Circuit recognized as much. *Savard*, 338 F.3d at 25, 26, 29, 31. The fact that the policy under attack was changed in March of 2000 also is a factor weighing against certiorari. The applicable three-year limitations period has run on any cases accruing prior to the policy change. *See,* R.I. Gen. Laws §§9-31-1, 9-1-25. There have

been no challenges to the new policy, which requires reasonable suspicion in non-violent, non-drug misdemeanor cases, in conformity with the District Court's decision in *Roberts*.

Finally, the District and Circuit Courts were correct in determining that qualified immunity should apply, since no reasonable official working in or overseeing the prison system in Rhode Island prior to March 16, 2000 had fair warning that their conduct was violating clearly established law. At that time, there was ample authority supporting officials' belief that the policy at Intake was constitutionally reasonable. Indeed, the First Circuit found the situation presented by Intake fell somewhere between the cases cited by Petitioners and those relied upon by prison officials. *Roberts*, 239 F.3d at 110. Cases cited by the Petitioners more commonly involved smaller, less secure facilities, and the First Circuit recognized this distinction. *Savard*, 338 F.3d at 30. All but one of the cases cited by the Petitioners were issued by courts other than the First Circuit, while prison officials believed that First Circuit and Supreme Court caselaw – *Arruda & Bell* – supported the policy at the ACI. In short, there was a "fork in the road" of decisional authority, one upholding strip search policies as reasonable under the Fourth Amendment in facilities similar to Intake – maximum security facilities. The second determined strip searches at local jails were constitutionally impermissible. Prison officials reasonably believed that the first line of cases was more applicable to their situation than the latter. Indeed, the procedural history of this case demonstrates that even federal judges cannot agree on the clarity of the law.

ARGUMENT

I. There Is No Compelling Reason To Grant Certiorari.

Rule 10 of the Supreme Court Rules provides that a writ of certiorari is a matter for judicial discretion, and will be granted *only* for compelling reasons. That Rule emphasizes that a petition for a writ of certiorari is rarely granted when the asserted error consists of the misapplication of a properly stated rule of law, as Petitioners urge in the instant case. The First Circuit's decision in this case does not conflict with any decision of this Court, and is not in conflict with any decision of any other Circuit, or with a decision of any state court of last resort.

Further, the policy regarding strip searches was changed in March of 2000, and is no longer used in the Rhode Island prison system.[5] "Rhode Island abandoned the proscribed policy from and after the date of the district court's decision . . . ." *Savard,* 338 F.3d at 26. Finally, the core argument offered by prison officials throughout this litigation is that Rhode Island's prison system is unique – there are no municipal or county facilities as most other states have. "Unlike other states, Rhode Island has no regional or county detention facilities. It operates only a single, all-purpose penitentiary: the ACI." *Savard,* 338 F.3d at 26. The First Circuit recognized this fact, and it played an important role in the outcome. This distinction makes this case unique and the holding of questionable

[5] Although Petitioners might lead this Court to believe that they represent "thousands" of others (Petition, p. 2, 4), the Motion to Certify a Class was not ruled on by the Court prior to the entry of summary judgment. (Pet. App. 57).

value in any other jurisdiction. Finally, the petition should be denied since the District and Circuit Courts were correct in determining that qualified immunity acts as a complete bar to an action for damages.

II. The First Circuit Did Not Formulate A New Standard For The Application Of Qualified Immunity.

The First Circuit correctly identified and discussed as the central issue of this dispute:

> . . . whether the law was clearly established, prior to March 17, 2000, to the effect that prison officials need at least reasonable suspicion before subjecting misdemeanant arrestees to strip searches when introducing them into the general population of a maximum security prison, and whether a reasonable prison official, situated similarly to the defendants, would have understood at that time that the policy in place at the ACI transgressed the Constitution.

Savard, 338 F.3d at 27.

It is clear, then, that the test applied by the First Circuit was wholly consistent with this Court's teachings on the subject. Petitioners have extrapolated two innocuous words from the entire opinion, and argue that this phrase establishes an entirely new and more relaxed standard for qualified immunity. Nothing could be further from the truth.

Throughout the opinion below, the Circuit Court discussed and applied *Hope* and other cases discussing the defense of qualified immunity. Whether the words "fair warning" or "clearly established" were used, the yardstick

by which the state of the law in March of 2000 was measured was a correct one. Both of those standards remain appropriate in determining whether qualified immunity should apply. A quick perusal of the First Circuit's decision amplifies the weaknesses of Petitioners' argument:

> Where, as here, a party's entitlement to summary judgment hinges on a claim of qualified immunity, we must balance the need to vindicate constitutional rights against the need to insulate public officials from civil litigation that might unduly inhibit the assiduous discharge of their duties. In balancing those competing needs, we employ a three-part algorithm . . . . [T]he second question deals with fair warning; it asks whether the law was clearly established at the time of the constitutional violation.

Savard, 338 F.3d at 27 (citations omitted).

> We must determine whether the law was clearly established prior to March 17, 2000, to the effect that prison officials need at least reasonable suspicion before subjecting misdemeanant arrestees to strip searches when introducing them into the general population of a maximum security prison, and whether a reasonable prison official, situated similarly to the defendants, would have understood at that time that the policy in place at the ACI transgressed the Constitution.

Id.

> . . . we begin our analysis with an examination of whether the law can be said to have been "clearly established" at or before the critical time . . . .

Id. (citations omitted).

> The bottom line is that the qualified immunity defense prevails unless the unlawfulness of the challenged conduct is "apparent."

Id. at 28 (citation omitted).

> . . . the Defendants did not have fair warning, prior to March 17, 2000, that their conduct was unlawful.

Id. at 33.

The two-word phrase that forms the basis for the instant Petition is contained on the last page of the decision, and constitutes mere *dicta*. This is too slender a reed upon which to rest certiorari in any case.

III. The Defense of Qualified Immunity Should Be Available To Government Officials Faced With Two Distinct Lines Of Caselaw, And Who Are Ultimately Determined To Have Chosen The Wrong "Fork In The Road".

The First Circuit concluded its *en banc* opinion by stating: "If judges can span the spectrum on this sort of constitutional question, it would certainly be unfair to hold the defendants liable for doing nothing more blameworthy than guessing incorrectly about how the courts ultimately would resolve the issue." *Savard*, 338 F.3d at 33 (citation omitted). That Court in *Roberts* had earlier decided that "[t]he institutional security concerns in play here fall somewhere between those exhibited in *Swain*, which were insufficient to support a search, and those in *Arruda* and *Bell*, which made broad based searches without individual suspicion reasonable." 239 F.3d at 111. To hold that a public official has forfeited qualified immunity and faces monetary liability under section 1983 in such a situation

would be untenable, and would constitute an extreme departure from all existing caselaw. "The law does not expect a public official, faced with the need to make an objectively reasonable real-world judgment, to anticipate precisely the legal conclusions that will be reached by a panel of federal appellate judges after briefing, arguments, and full-fledged review." *Roberts*, 239 F.3d at 111. An official's claim of qualified immunity will be defeated if, "in light of preexisting law" the unlawfulness of his conduct was "apparent." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). This Court should be mindful, in determining what law is "clearly established" for qualified immunity purposes, that the vast majority of state officers are *not* lawyers, and rely on the relevant guidance of others in the conduct of their duties. They cannot be expected to be "seers in the crystal ball of constitutional doctrine" any more than "high state officials." *Westberry v. Fisher*, 309 F.Supp. 12, 17 (D. Me. 1970). They are not "charged with predicting the future course of constitutional law." *Pierson v. Ray*, 386 U.S. 547 (1967).

This Court has recognized that "[i]f judges thus disagree on a constitutional question, it is unfair to subject [officials] to money damages for picking the losing side of the controversy", *Wilson v. Layne*, 526 U.S. 603 (1999) and thus should concur with the First Circuit, who refused to "require public officials to foretell the course of constitutional laws with absolute accuracy in order to obtain the balm of qualified immunity." *Savard*, 338 F.3d at 33. This, coupled with the deference which must be afforded prison officials, *see Bell v. Wolfish*; *Block v. Rutherford*, 468 U.S. 576 91984) makes it clear that qualified immunity should attach in this case.

Any discussion of qualified immunity must now begin with an examination of *Hope v. Pelzer*, *supra*, decided only weeks after Judge Lisi issued her decision in this case. *Hope* was initially met with much consternation – government officials and their counsel wondering why the alteration of the now comfortable qualified immunity standard of *Harlow v. Fitzgerald,* 457 U.S. 800 (1982), and its progeny. When the decision is fully understood, and the cases that have subsequently applied its teachings are reviewed, it becomes clear that *Hope* did not radically change the law. "*Hope* does not purport to overrule, modify, or even question anything the Supreme Court had earlier said about qualified immunity. The Supreme Court decisions preceding *Hope* are still good law." *Vinyard v. Wilson*, 311 F.3d 1340 (11th Cir. 2002). Indeed, the most radical thing that can be said about *Hope* is that it articulated the "obvious violation" exception to the requirement that the law be "clearly established" in order to overcome a qualified immunity defense. 122 S.Ct. at 2514. In other words, if the actions complained of are *so* egregious that a reasonable official should know that a constitutional line has been crossed, qualified immunity will provide no defense. *Willingham v. Loughnan*, 321 F.3d 1299 (11th Cir. 2003). If the particular facts of a case are "so far beyond the hazy border" between constitutionally acceptable and impermissible, *Smith v. Mattox*, 127 F.3d 1416, 1419 (11th Cir. 1997), the mere fact that no prior official acted so egregiously, and therefore there is a dearth of caselaw with similar facts, a Defendant is not allowed one "free bite."[6]

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[6] There are cases where the facts are determined to be *so* egregious that no decision is required before a defendant has "fair warning" that

(Continued on following page)

Hope is not particularly helpful or applicable in this case, because unlike there, where there was no caselaw dealing with the specific (or even similar) facts alleged (arguably because of their egregious nature), in the instant dispute there are *two* distinct lines of decisional law – both in this Circuit and elsewhere. In short, *Hope* does little to assist the Court in this situation.

Petitioners make much of the fact that out of the many cases cited by J. Lisi in her opinion, one was remanded by this Court for further consideration in light of *Hope*.[7] Judge Lisi cited the Eleventh Circuit's decision in *Thomas v. Roberts*, 261 F.3d 1160 (11th Cir. 2001) for the proposition that the applicable law in the case *sub judice* was not "developed in such a factually defined context that the individual defendants should have been aware that they were acting illegally when they either ordered or performed the searches in question." *Savard* slip op. at 13 (Petitioner's Appendix, p. 70). Petitioners' argument relative to the *Thomas* case in misleading by virtue of its incompleteness.

Following *Hope*, this Court remanded *Thomas* for reconsideration. *See* 536 U.S. 953 (2002). On remand, the Eleventh Circuit issued an even stronger opinion, holding that while the strip searches involved were unreasonable, the individual defendants were nonetheless entitled to

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his conduct is constitutionally impermissible. *See, e.g., United States v. Lanier*, 520 U.S. 259 (1997) (sexual assault by judge in chambers); *Priester v. City of Riviera Beach*, 208 F.3d 919, 927 (11th Cir. 2000) (police officer ordering dog to viciously attack plaintiff); *Smith v. Mattox, supra*, (arresting officer broke arm of "docile" arrestee).

[7] The First Circuit did not cite this case.

qualified immunity for their actions. *Thomas v. Roberts*, 323 F.3d 950 (11th Cir. 2003) ("*Thomas II*").

Thomas II recognized that *Hope* articulated "the salient question" as "whether the state of the law [at the time of the action in question] gave [the officers] fair warning that their alleged [actions were] unconstitutional." 323 F.3d at 953, citing *Hope*, 536 U.S. at 741. *Hope* was also interpreted as teaching that the notice to officials must be a "fair *and clear* warning." *Hope,* 536 U.S. at 744 (citation omitted).

As stated in *Thomas II*, the balancing test used to determine the reasonableness of a strip search under the Fourth Amendment:

> will, in most instances, call for . . . officials to speculate as to whether a court applying the balancing test to specific facts would find a search unreasonable. As this court has noted, where the applicable legal standards is a highly general one, such as 'reasonableness', preexisting case-law that has applied general law to specific circumstances will almost always be necessary to draw a line that is capable of giving fair and clear notice that an official's conduct will violate federal law.

323 F.3d at 954 (citations omitted).

The Eleventh Circuit found the case put forth by the plaintiff as "clearly establishing" the constitutional right to be free from a strip search under the specific facts involved was:

> so different from the facts in this case that [the case plaintiff cited] offers little guidance: Defendants could not have compared their situation

> with the situation in [plaintiff's case] and found that the comparison fairly and clearly warned that a 'strip search' of this kind would be unconstitutional.

Id. Particularly applicable to the present case is the admonition that "public officials 'are not obligated to be creative or imaginative in drawing analogies' nor do we require them to 'construe general legal formulations that have not once been applied to a specific set of facts by any binding judicial authority.'" *Id.* fn.6 (citation omitted).

The post-*Hope* decision of *Wilson v. Jones*, 251 F.3d 1340 (11th Cir. 2001) is also particularly instructive. In holding that a strip search violated the Fourth Amendment, but affording qualified immunity, this case placed great weight on the fact that Wilson was placed in the general population of the jail, where she had the opportunity to interact with others. The Eleventh Circuit affirmed *Bell's* recognition that "[a] detention facility is a unique place fraught with serious security dangers. Smuggling of money, drugs, weapons, and other contraband is all too common an occurrence." 251 F.3d at 1344. Given that language, *Wilson* held that it was not unreasonable for someone in Sheriff Jones' position to believe that blanket strip searches of newly admitted detainees were justified based on the serious risk that smuggled weapons and other contraband posed to the jail's security. The fact that *Bell* upheld a more intrusive search than the one in *Wilson* (or that at issue here) further weighed against a conclusion that *Bell* should have put Sheriff Jones (or these ACI officials) on notice that the strip search policy was unconstitutional.

In *Robles v. Prince George's County, Md.*, 302 F.3d 262 (4th Cir. 2002), the Fourth Circuit granted qualified

immunity to officers who had handcuffed an arrestee to a pole in a deserted shopping center in the middle of the night for ten minutes. That Court held that qualified immunity, and therefore liability, turns on what notice the officers had that their conduct violated federal constitutional law. Even in light of facts similar to *Hope*, the distinguishing factors made the conduct not apparently unconstitutional.

On denial of rehearing *en banc*, *Robles v. Prince George's County, Md.*, 308 F.3d 437 (4th Cir. 2002), the Chief Judge of that Circuit (concurring) wrote: "What the panel was unwilling to do was to take this holding of first impression and strip the qualified immunity defense of any notice component whatsoever." The Fourth Circuit did not read *Hope* as abandoning the requirement of notice. *Accord, Vinyard v. Wilson*, 311 F.3d at 1352: "When fact specific precedents are said to have established the law, a case that is fairly distinguishable (or distinguishable in a fair way) from the circumstances facing a government official cannot clearly establish the law for the circumstances facing that government official – so that qualified immunity applies."

In *McClendon v. City of Columbia*, 305 F.3d 314 (5th Cir. 2002), an *en banc* panel upheld the grant of summary judgment based on qualified immunity, the Court recognizing that although the plaintiff's theory was recognized at a general level, that did not necessarily provide an officer with notice that his specific actions created the danger that ultimately became the focus of the case. The Fifth Circuit held that qualified immunity should be granted if a reasonable official would be left uncertain of the law's application to the facts confronting him. These cases make it crystal clear that, even since *Hope*, notice is required

that what an officer is doing is clearly unconstitutional before personal liability may attach.

IV. The Law Was Not Clearly Established, And Did Not Give Reasonable Prison Officials Fair Warning, That Prior To March 16, 2000 It Was Constitutionally Impermissible To Strip Search All Inmates Committed To The Care, Custody And Control Of A Maximum Security Facility Housing A General Prison Population.

It is hornbook law – the doctrine of qualified immunity precludes suits for money damages against state officials "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, supra. Qualified immunity is "an immunity from suit rather than a mere defense to liability [which] . . . is effectively lost if a case is erroneously permitted to go to trial." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). The qualified immunity defense exists not only to shield officials from liability for damages, but also to protect from "the general costs of subjecting officials to the risks of trial – of discretionary action, and deterrence of able people from public service." *Harlow*, 457 U.S. at 816. Qualified immunity leaves "ample room for mistaken judgments" and protects "all but the plainly incompetent or those who knowingly violate the law." *Bilida v. McCleod*, 211 F.3d 166, 174 (1st Cir. 2000), citing *Malley v. Briggs*, 475 U.S. 335, 341, 343 (1986). Without proper immunity for reasonable *mis*interpretation, governmental actors would be placed in the untenable position of facing the burdens of litigation and the risk of liability for guessing incorrectly

when the constitutional provision itself provides little guidance.[8] Petitioners do not accept the fact that prevalence on the merits of their constitutional claim does not equal a payoff from the state fisc. More must be shown before the doors of the treasurery are opened. A "claim of immunity is conceptually distinct from the merits of the plaintiff's claim that his rights have been violated." *Mitchell v. Forsyth*, 472 U.S. 511, 527-528 (1985).

Qualified immunity seeks to ensure that governmental defendants reasonably can anticipate when their conduct may give rise to liability by attaching liability *only if* the contours of the right violated are sufficiently clear that a reasonable official would understand that what he is doing violates that right. *Jenkins v. Talladega City Board of Education,* 115 F.3d 821, 825, n.3 (11th Cir. 1997). It is not enough for the constitutional right to be "clearly established" at a highly abstract level; what matters is whether in the circumstances faced by the official, he should reasonably have understood that his conduct violated clearly established law. *Berthiaume v. Caron*, 142 F.3d 12, 15 (1st Cir. 1998).

In *DeAbadia v. Izquierdo Mova*, 792 F.2d 1187 (1st Cir. 1986), the First Circuit stated:

> . . . we are presently concerned not with the correctness of defendants' determination, on the one hand, nor their subjective state of mind, but of the 'objective reasonableness' of their conduct . . .

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[8] In this case, the Fourth Amendment prohibits only "unreasonable" searches.

> *Harlow* demands not prescience, but subjective good faith.
>
> 792 F.2d at 1193.

In the First Circuit, there is a three-step inquiry for evaluating qualified immunity claims: (1) whether the claimant has alleged the deprivation of an actual constitutional right; (2) whether the right was clearly established at the time of the alleged action or inaction; and (3) if both of these questions are answered in the affirmative, whether an objectively reasonable official would have believed that the action taken violated that clearly established constitutional right. *Nelson v. Kline*, 242 F.3d 33 (1st Cir. 2001); *Abreu-Guzman v. Ford*, 241 F.3d 33 (1st Cir. 2001).

The cases relied upon by the State throughout the years supported its reasonable belief that the strip search policy was constitutional.[9] In ruling to the contrary, *Roberts* offered the first reported decision in this country holding that officials at a maximum security facility containing a general prison population could not strip

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[9] Indeed, even today one commentator laments that "[t]he lower Federal Courts have not yet settled upon a consistent approach that conforms to Supreme Court precedent for the assessment of the constitionality of strip search policies that apply to arrestees and detainees." and "The varied approaches lower courts have taken to analyzing the question of arrestees' and detainees' rights to be free from unreasonable strip searches demonstrate the level of confusion that exists in this case of the law." Deborah L. MacGregor, *Stripped Of All Reason? The Appropriate Standard For Evaluating Strip Searches Of Arrestees And Pre-Trial Detainees In Correctional Facilities*, 36 Colum. J. L. & Soc. Probs. 163 (Winter, 2003).

search those about to be introduced into the facility.[10] That decision could not be harmonized with opinions in *Arruda v. Fair*, supra and *Wood v. Clemons*, 89 F.3d 922 (1st Cir. 1996). In fact, the Circuit Court held that the situation presented by Intake fell in a completely new area of strip search law. *Roberts*, 239 F.3d at 111. *Roberts* also had to explain why it was not inconsistent with this Court's pronouncement in *Bell* that pretrial detainees may be subjected to a strip search in a large general population facility.

In *Bell*, the only strip search decision issued by this Court,[11] Chief Justice Rehnquist examined the constitutional rights of the pretrial detainee. In *Bell*, as in the present case, pretrial detainees were held in a large general population facility. However, the instant case arguably provided a more compelling background for allowing strip searches. *Bell* did not involve a maximum security facility. Rather, it was a detention center for

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[10] For the first time in this litigation, Petitioners make light of the maximum security designation held by Intake. *See* Petition, p. 1 ("so-called 'maximum security facility.'"); p. 3 ("which respondents have labeled a 'maximum security facility'"); p. 7 ("so-called 'maximum security facilities'"); and p. 10 ("*in what government authorities call a 'maximum security facility'*") (emphasis in original). Petitioners did not question the maximum security designation of Intake, either in *Roberts*, or in the present case. It is simply too late now. Whether they like it, or understand it, Intake *is* a maximum security facility, and was recognized as such by the courts below. *See Roberts I*, 175 F.Supp. 2d at 181; *Roberts II*, 239 F.3d at 109, 111; *Savard I*, No. 00-261ML, Pet.App. 58, *Savard II*, 338 F.3d at 27, 29, 30, 31 and 33. Indeed, even the dissent in *Savard II* respected the maximum security designation of Intake. *Id.* at 38, 40.

[11] Petitioners ignore *Bell*, never citing or discussing the paramount importance of this decision to the case *sub judice*.

federal pretrial detainees. It was reasonable for the State to believe that *Bell* was controlling precedent, applicable to Intake.

In *Ward v. County of San Diego*, 791 F.2d 1329 (9th Cir. 1986), the Ninth Circuit held that there are not one, but two articulable and overlapping reasons that could uphold a strip search policy. One of those reasons is custodial arrest, always present at Intake. The other is the "reasonable suspicion" standard. In *Arruda v. Fair,* the First Circuit made it clear that the ultimate Fourth Amendment question is whether a prison search policy is reasonable under *all of the circumstances. Wood v. Clemons* teaches that the meaning of reasonableness for Fourth Amendment purposes is highly situational. "A search that is reasonable in the prison environment may not be in other context less fraught with serious security dangers." 89 F.3d at 928. A close examination of the two distinct lines of strip search cases (custodial and non-custodial arrests) highlights two distinct outcomes: In the first, strip searches have been upheld as constitutionally permissible when individuals are co-mingling within a general prison-not jail-population. In the second, the strip search is found to violate an individual's constitutional rights to be free from unreasonable search and seizures because of the circumstances of those cases i.e., an individual held in a jail cell alone for a short time, with no transportation and no co-mingling. In the latter, there are often facts shocking to the Court, often occurring in municipal or county jail facilities where an inmate is kept for only a short period of time in a cell alone. *Compare Logan v. Shealey*, 660 F.2d 1007 (4th Cir. 1981), *cert. denied sub. nom., Clement v. Logan*, 455 U.S. 942 (1982) (strip search of female DWI arrestee held unreasonable

when "at no time would [plaintiff] or similar detainees be intermingled with the general jail population"); *Swain v. Spinney*, supra (arrestee's strip search performed in local jail cell under circumstances which could be interpreted as retaliatory held unreasonable); and *Watt v. Richerson*, 849 F.2d 195 (5th Cir. 1988) (4th Amendment held violated during strip search at local jail when woman was released after 5-10 minutes, officials knew she had bail money on the way, and she was never co-mingled with general jail population); *with Dufrin v. Spreen*, 712 F.2d 1084 (6th Cir. 1983) (strip search held constitutionally permissible where mother arrested one month after assault on stepdaughter – fact of incarceration with general population coupled with reasonable nature of search was critical); *Dobrowolsky v. Jefferson County, Kentucky*, 823 F.2d 955 (6th Cir. 1987) (strip search upheld as reasonable when pretrial detainee was not searched until he was about to be introduced into the general prison population); and *Roscom v. City of Chicago*, 570 F.Supp. 1259 (N.D.Ill. 1983) (upheld strip search as reasonable as to pretrial detainee arrested for bad checks, since the county could "reasonably consider any [detainee] could be carrying weapons or contraband, either brought with detainee into the county jail or procured from other persons in the holding cell."). A review of these decisions makes it clear that co-mingling with a general population and the security designation of the facility has been the lynchpin in determining whether a strip search is constitutionally permissible.

A recent case from the Eleventh Circuit, *Evans v. City of Zebulon*, No. 02-16424 2003 WL 22707338 (11th Cir. November 13, 2003), points out that even as of 2001 the law was unclear that reasonable suspicion was required to conduct a strip search or body cavity search of an

arrestee detained in the general jail population. 2003 WL 22707338, *5, citing *Wilson v. Jones*, supra. In *Evans*, the facts were much more egregious than those offered herein. The officers in *Evans* apparently manhandled the plaintiffs, inserted a billy club or flashlight into the anus of one plaintiff, and used the same object to manipulate the testicles of both plaintiffs, who were searched in the presence of each other. That Circuit held that the "general legal principles stated in *Bell* and *Justice* do not apply with such obvious clarity to the facts of this case that no reasonable officer could have believed the manner in which the strip searches of the appellees were performed was constitutional." 2003 WL 22707338, *7.

This Court has recognized the ever present threat of smuggling in a prison setting: "it is not unreasonable to assume that low security risk detainees would be enlisted to help obtain contraband or weapons by their fellow inmates." *Block v. Rutherford*, 468 at 587. In *Block* the Court took judicial notice that drugs are a problem in virtually every penal and detention center in the country. 468 U.S. at 588-89. In *Bell,* this Court found that "there is no basis for concluding that pretrial detainees pose any lesser security risk than convicted inmates." 414 U.S. at 546, n. 28. In *Arruda*, the First Circuit, in giving deference to prison officials, upheld a strip search policy because it involved a maximum security facility containing dangerous prisoners, and because there was a lengthy history of prison contraband as well as instances of guards smuggling. Except for the last point, all of the factors in *Arruda* are present at Intake. In *Cochrane v. Quattrochi*, 949 F.2d 11 (1st Cir. 1991), the First Circuit noted that a prisoner admitted using contraband drugs ten to twenty times while incarcerated in the State's prison system.

The above discussion of the law prior to March 16, 2000, makes it clear that the law was *not* clearly established, that prison officials did not act unreasonably, and that qualified immunity was correctly afforded the individual defendants herein.

CONCLUSION

The First Circuit and the District Court were correct in holding that the instant action for damages was barred. It is true in the usual case that the doctrine of qualified immunity is necessary if State government is to effectively operate. This case cries out for the application of that doctrine as a complete bar to the Section 1983 claims, since this Court has "emphasized that [it is] unwilling to substitute [its] judgment on the difficult and sensitive matters of institutional administration and security for that of (those running the institutions)." *Block v. Rutherford*, 468 U.S. at 588. Should this Court decline to give these individuals the "breathing space" they need to perform their job, the greater the potential for state employees to incur litigation costs and potential judgments under section 1983. Given that the State not only indemnifies their employees against such judgments, but also assumes the costs of their defense, these financial costs fall directly upon the State. Further, although Section 1983 lawsuits undoubtedly deter some unlawful behavior, they can, absent appropriate qualified immunity protection, make it more difficult to recruit and retain high-quality employees. Indeed, this Court has long recognized these and other "social costs" of suits against government officials, including "the expense of litigation, the diversion of official energy from pressing public issues,

and the deterrence of able citizens from acceptance of public office," as well as "dampen[ing] the ardor of all but the most resolute, or the most irresponsible" government officials "in the unflinching discharge of their duties." *Harlow*, 457 U.S. at 818.

Respondents therefore respectfully request that the instant petition be denied.

Respectfully submitted,

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In The
Supreme Court of the United States

ANGELA SAVARD, et al.,

Petitioners,

v.

STATE OF RHODE ISLAND, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

I. Respondents' Brief Illustrates the Degree of "Legal Wrangling" Invited By the First Circuit's "Clear Guidance" Standard..... 1

II. Respondents Have Offered No Authority That Legitimizes Blanket Strip-Searches of Minor Offense Arrestees Without Reasonable Suspicion 1

III. Respondents Have Offered No Authority Legitimizing a Distinction Between a "Jail" and a "Maximum Security Facility" in the Circumstances of This Case 6

IV. Respondents Are Not Entitled to Qualified Immunity Absent a "Maximum Security Facility Exception" to the General Rule Barring Blanket Strip-Searches of Minor Offense Arrestees 7

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Arruda v. Fair, 710 F.2d 886 (1st Cir. 1983) 2

Bell v. Wolfish, 441 U.S. 520 (1979)..... 6

Chapman v. Nichols, 989 F.2d 393 (10th Cir. 1993).....5, 7

Dobrowolskyj v. Jefferson County, 823 F.2d 955 (6th Cir. 1987).....2, 3

Dufrin v. Spreen, 712 F.2d 1084 (6th Cir. 1983).....2, 3

Evans v. City of Zebulon, 2003 WL 22707338 (11th Cir. November 13, 2003) 3

Giles v. Ackerman, 746 F.2d 614 (9th Cir. 1984), *cert. denied*, 471 U.S. 1053 (1985) 4, 5

Hatch v. Department for Children, 274 F.3d 12 (1st Cir. 2001)..... 4

Hill v. Bogans, 735 F.2d 391 (10th Cir. 1984).....4, 5

Hope v. Pelzer, 536 U.S. 730 (2002).....1, 3, 7

Jones v. Edwards, 770 F.2d 739 (8th Cir. 1985)..... 4

Logan v. Shealy, 660 F.2d 1007 (4th Cir. 1981), *cert. denied*, 455 U.S. 942 (1982) 4

Mary Beth G. v. City of Chicago, 723 F.2d 1263 (7th Cir. 1983).....3, 4

Masters v. Crouch, 872 F.2d 1248 (6th Cir.), *cert. denied*, 493 U.S. 977 (1989) 2, 3, 4, 5

Roscom v. City of Chicago, 570 F. Supp. 1259 (N.D. Ill. 1983) 3

Shain v. Ellison, 273 F.3d 56 (2nd Cir. 2001)..... 6

Stewart v. Lubbock County, Texas, 767 F.2d 153 (5th Cir. 1985), *cert. denied*, 475 U.S. 1066 (1986)..... 4

TABLE OF AUTHORITIES – Continued

Page

Swain v. Spinney, 117 F.3d 1 (1st Cir. 1997) 4, 5

Thomas v. Roberts, 323 F.3d 950 (11th Cir. 2003) 4

Walsh v. Franco, 849 F.2d 66 (2nd Cir. 1988) 5

Weber v. Dell, 804 F.2d 796 (2nd Cir. 1986), *cert. denied*, 483 U.S. 1020 (1987) 4

Wilson v. Jones, 251 F.3d 1340 (11th Cir. 2001) 3

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

I. Respondents' Brief Illustrates the Degree of "Legal Wrangling" Invited By the First Circuit's "Clear Guidance" Standard.

Respondents cite no case validating the blanket strip-searches of minor offense arrestees in which Respondents engaged, because there is none. Instead, Respondents misrepresent the holdings of cases clearly inapplicable to the issues at hand, contrive unduly restrictive interpretations of decisions that *are* applicable, and ignore the core line of authority that emasculates Respondents' central argument.

Respondents' Brief is a tortured effort to defend a decision immunizing them from the consequences that should follow from their flagrant and systematic violation of clearly established law prohibiting strip-searches of minor offense arrestees when there is no reasonable suspicion that they are carrying or concealing weapons or contraband. This is precisely the type of "legal wrangling" the Court hoped to avoid by adopting the "fair warning" standard in *Hope v. Pelzer*, 536 U.S. 730, 742 (2002), and which is now encouraged by the "clear guidance" standard articulated by the First Circuit in this case.

II. Respondents Have Offered No Authority That Legitimizes Blanket Strip-Searches of Minor Offense Arrestees Without Reasonable Suspicion.

The authorities cited by Respondents to justify their blanket strip-searches of Petitioners involve post-arraignment strip-searches of dangerous inmates, and

strip-searches of persons arrested for felonies or offenses typically associated with possession of weapons or contraband. These authorities are clearly inapplicable to the issues at hand, and did not create a "fork in the road" that Respondents could travel with impunity.

Arruda v. Fair, 710 F.2d 886 (1st Cir. 1983), did not involve pre-arraignment strip-searches of minor offense arrestees. Justice Breyer's decision in that case made clear that it concerned *post-arraignment* searches of inmates in a "special security area" *within* a maximum security facility, "the only such institution in Massachusetts designed to hold those inmates who posed the greatest risks to society and to each other." *Id.* at 887. The inmates searched in *Arruda* were considered so dangerous that they were segregated from other inmates in the facility because their "continued retention in the general institution population [was] detrimental to the program of the institution." *Id.* No reasonable official reading *Arruda* could conclude that it would have any applicability whatsoever to a blanket strip-search policy applied to minor offense arrestees prior to their arraignment.

Dufrin v. Spreen, 712 F.2d 1084 (6th Cir. 1983), involved a plaintiff arrested for felonious assault, not a minor offense. The court in *Dufrin* specifically distinguished the circumstances of that case from those "involv[ing] misdemeanors, traffic offenses, or similar minor offenses not normally associated with weapons or contraband." *Id.* at 1088. Likewise, *Dobrowolskyj v. Jefferson County*, 823 F.2d 955 (6th Cir. 1987), stands merely for the proposition that a "strip-search policy was constitutional as applied to a . . . jail detainee who had been arrested and charged with 'menacing,' an offense normally associated with weapons and other contraband." *Masters v. Crouch*,

872 F.2d 1248, 1256 (6th Cir.), *cert. denied*, 493 U.S. 977 (1989). Of course, the Sixth Circuit's opinion in *Masters* antedated its opinions in both *Dufrin* and *Dobrowolskyj*, and held:

> [I]t was clearly established *in October, 1986* that authorities may not strip-search persons arrested for traffic violations and non-violent minor offenses *solely because such persons ultimately intermingle with the general population at a jail* when there were no circumstances to support a reasonable belief that the detainee will carry weapons or other contraband into the jail.

Id. 872 F.2d at 1255 (emphasis added).

While it cannot be determined from a review of the District Court's opinion in *Roscom v. City of Chicago*, 570 F. Supp. 1259 (N.D. Ill. 1983), whether the pre-trial detainee in that case had been arrested for a minor offense or a felony, it remains the law in the Seventh Circuit that strip-searches of minor offense arrestees are barred absent a reasonable belief that they will reveal weapons or contraband. *See Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1272 (7th Cir. 1983).

Respondents also err grievously in relying upon Eleventh Circuit strip-search authority. Respondents cite *Wilson v. Jones*, 251 F.3d 1340 (11th Cir. 2001),[1] and *Evans v. City of Zebulon*, 2003 WL 22707338 (11th Cir. November 13, 2003), to support their claim "that even as of 2001 the

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[1] Respondents erroneously characterize *Wilson* as a "post-*Hope* decision." Respondents' Brief in Opp'n at 14. The Eleventh Circuit's decision in *Wilson* issued in 2001. This Court decided *Hope* in 2002.

law was unclear that reasonable suspicion was required to conduct a strip-search or body cavity search of an arrestee detained in the general jail population." (Respondents' Brief in Opp'n at 21-22.) Respondents neglect that the Eleventh Circuit does not look to the law outside its own circuit to determine what is clearly established law. *Thomas v. Roberts*, 323 F.3d 950, 955 (11th Cir. 2003) ("As we have stated, only Supreme Court cases, Eleventh Circuit case law, and [state] Supreme Court case law can 'clearly establish' law within this Circuit.") Thus, the Eleventh Circuit ignores not just a consensus of persuasive authority, but the *plethora* of authority from other circuits extending back over two decades that is unanimous in its condemnation of blanket strip-searches of minor offense arrestees when there is no reasonable suspicion that they are carrying or concealing weapons or contraband. *Weber v. Dell*, 804 F.2d 796, 802 (2nd Cir. 1986), *cert. denied*, 483 U.S. 1020 (1987); *Logan v. Shealy*, 660 F.2d 1007, 1013 (4th Cir. 1981), *cert. denied*, 455 U.S. 942 (1982); *Stewart v. Lubbock County, Texas*, 767 F.2d 153, 156-57 (5th Cir. 1985), *cert. denied*, 475 U.S. 1066 (1986); *Masters v. Crouch*, 872 F.2d 1248, 1257 (6th Cir.), *cert. denied*, 493 U.S. 977 (1989); *Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1273 (7th Cir. 1983); *Jones v. Edwards*, 770 F.2d 739, 741-42 (8th Cir. 1985); *Giles v. Ackerman*, 746 F.2d 614, 615 (9th Cir. 1984), *cert. denied*, 471 U.S. 1053 (1985); *Hill v. Bogans*, 735 F.2d 391, 394 (10th Cir. 1984).

By contrast, the First Circuit looks "not only to Supreme Court precedent but to all available case law" to determine whether the contours of a constitutional right are clearly established. *Hatch v. Department for Children*, 274 F.3d 12, 23 (1st Cir. 2001). Moreover, in its 1997 decision in *Swain v. Spinney*, 117 F.3d 1 (1st Cir. 1997),

which predated both Petitioners' strip-searches and the Eleventh Circuit authority cited in Respondents' Brief, the First Circuit recognized that clearly established law required that "[a] strip and visual body cavity search of an arrestee must be justified, *at the least*, by a reasonable suspicion." *Id.* at 5, 7 (emphasis added).

In addition to their reliance on clearly inapplicable authority, Respondents engage in an unduly restrictive interpretation of authority that is clearly applicable to Petitioners' circumstances. Perhaps the best example is Respondents' treatment of *Swain*, which they represent "requires a showing of reasonable suspicion to strip search an individual *in a single cell municipal jail*." (Respondents' Brief in Opp'n at 3) (emphasis added). There is nothing in the First Circuit's decision in *Swain* to suggest that it should apply only to cases involving a single cell municipal jail. To the contrary, it is clear from the First Circuit's decision in *Swain* that it was joining the other federal circuit courts of appeal that had unanimously condemned strip-searches of minor offense arrestees when there exists no reasonable suspicion that they are carrying or concealing weapons or contraband. *Swain*, 117 F.3d at 7.

Even more appalling is Respondents' failure to acknowledge – much less address – the fact that the courts have repeatedly and unanimously rejected mere commingling with more serious offenders as a justification for strip-searching minor offense arrestees. *Chapman v. Nichols*, 989 F.2d 393, 396 (10th Cir. 1993); *Masters v. Crouch*, 872 F.2d 1248, 1255 (6th Cir.), *cert. denied*, 493 U.S. 977 (1989); *Walsh v. Franco*, 849 F.2d 66, 69 (2nd Cir. 1988); *Giles v. Ackerman*, 746 F.2d 614, 619 (9th Cir. 1984), *cert. denied*, 471 U.S. 1053 (1985); *Hill v. Bogans*, 735 F.2d 391, 394 (10th Cir. 1984). These cases carve a

clear path right between Respondents' figurative "fork in the road" that should have lead them to the inescapable conclusion that their blanket strip-searches of Petitioners would not pass constitutional muster.

III. Respondents Have Offered No Authority Legitimizing a Distinction Between a "Jail" and a "Maximum Security Facility" in the Circumstances of This Case.

There is no record evidence to support Respondents' assertion that the cases cited in support of the Petition "involved smaller, less secure facilities" than the ACI. (Respondents' Brief in Opp'n at 5.) At a time when "jails" house convicted felons, and a "maximum security facility" like the ACI holds pretrial detainees, there is little practical distinction between the terms, particularly as it relates to the protection of the Fourth Amendment rights of minor offense arrestees. *See, e.g., Bell v. Wolfish*, 441 U.S. 520, 546 n. 28 (1979); *Shain v. Ellison*, 273 F.3d 56, 72 n. 3 (2nd Cir. 2001) (J. Cabranes dissenting).

Respondents state that "co-mingling with a general population and the security designation of the facility has been the lynchpin in determining whether a strip-search is constitutionally permissible." (Respondents' Brief in Opp'n at 21.) But the ACI's designation as a "maximum security facility" has no relevance absent commingling. Had Petitioners been segregated from more serious offenders, there would have been no security interest to justify their strip-search; merely calling the ACI a "maximum security facility" does not, of itself, create the circumstances that would justify the strip-search of a minor offense arrestee. And as set forth above, mere commingling has never been

found by any court to justify the strip-search of a minor offense arrestee.

IV. Respondents Are Not Entitled to Qualified Immunity Absent a "Maximum Security Facility Exception" to the General Rule Barring Blanket Strip-Searches of Minor Offense Arrestees.

Despite the general rule barring blanket strip-searches of minor offense arrestees, Petitioners' claims were dismissed because they could not provide the First Circuit with a case in which such a rule was applied to a "maximum security facility." The result was the first decision of a federal circuit court of appeal granting qualified immunity for blanket strip-searches of minor offense arrestees. *See Chapman*, 989 F.2d at 398 ("[N]o circuit case has upheld the grant of qualified immunity when asserted against a claim based on an across-the-board policy of strip searching minor offense detainees.").

This was not a burden that should have been imposed on Petitioners. Rather, it should have been *Respondents'* burden to furnish the Court with some authority showing that a maximum security facility enjoyed an exception to the clearly established law barring blanket strip-searches of minor offense arrestees. Placing such a burden on Respondents is essential to give meaning to *Hope*'s fair warning standard by requiring – particularly in a case involving a written policy and not a split-second decision – that government officials know the law and respect individuals' civil liberties in the absence of some authority

creating an exception to clearly established general rules that are infringed by the officials' conduct.

CONCLUSION

WHEREFORE, Petitioners respectfully request that their Petition be granted.

Respectfully submitted,

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